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In The

Supreme Court of the United States

October Term, 1978

No. 78-1654

PETER BRANTI, As Public Defender
of Rockland County,

Petitioner,

vs

AARON FINKEL and ALAN TABAKMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT

Petitioner, Peter Branti, as Public Defender of Rockland County, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered February 20, 1979 (Docket No. 78-7494). The judgment affirmed the opinion of District Court Judge Vincent L. Broderick dated September 29, 1978 (Docket No. 78 Civ. 14).

OPINIONS BELOW

The memorandum and judgment of the Second Circuit Court of Appeals dated February 20, 1979, which judgment is sought to be reversed, is not as yet reported and is printed in the Appendix to this petition at pages 1a-4a. The opinion for the United States District Court for the Southern District of New York also reprinted in the Appendix at pages 5a-32a is reported in 457 F. Supp. 1284.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. 1983, which are set forth in the Appendix.

ISSUES INVOLVED

1. Whether the Circuit Court and District Court holdings have extended or misinterpreted Elrod v. Burns, 427 U.S. 347 (1976) by including attorneys, employed part-time as assistant public defenders, within a class of non-policymaking, non-confidential employees such as clerks, sheriff's deputies and janitors. The affirmance of the trial court's judgment virtually eliminates political appointments in Federal, State and local governments.

2. Whether the requirement of obtaining sponsorship alone, absent any coercive acts as outlined in Elrod v. Burns amounts to purposeful and intentional discrimination against the Respondents.

3. Whether the District Court's holding was "clearly erroneous" in that Petitioner did present a legitimate "same decision anyway" defense in accordance with Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, (1977) and Givhan v. Western Line Consolidated School District --U.S.--, 58 LEd 2d 619 (1979).

4. Whether the decision of the 4th Circuit in Ramey v. Harber, 589 F.2d 753 (1978) which is at variance with the rulings in this case amounts to a conflict in the Circuits.

PRELIMINARY STATEMENT

On January 4, 1978, Respondents (hereafter referred to as Messrs. Finkel and Tabakman) brought suit in the District Court for the Southern District of New York against Peter Branti, as Public Defender of the County of Rockland, New York and members of the County Legislature alleging that they were threatened with the termination of their positions as assistant public defenders solely because of their affiliation with the Republican Party. (The case against all defendants except Mr. Branti was dismissed prior to the plenary trial.) The Respondents claimed that they were neither policymaking nor confidential employees and that they were satisfactorily performing their duties. They sought injunctive relief upon the claim that the threatened action violated their First and Fourteenth Amendment rights to freedom of political association and belief.

The Respondents, Aaron Finkel and Alan Tabakman, as assistant public defenders, were appointed in 1971 and 1975, respectively. Assistant public defenders hold part-time positions in Rockland County, permitting their private practice of law. Plaintiffs

were in the exempt class of the Civil Service serving at the pleasure of the Public Defender. The former Public Defender, Frank Barone, had a term of office which ended December 31, 1977, and his termination ended the employment of all his assistants. In the past, the terms of all assistant public defenders ended with the term of the Public Defender. A new public defender would then make appointments to fill such positions in accordance with New York Law.

Upon his appointment as Public Defender, Mr. Branti appointed his assistants. All of the assistants appointed by Mr. Branti were registered Democrats, except one individual, who had no party affiliation. Mr. Branti did not reappoint two registered Democrats.

Respondents and their witnesses described Respondents' job performance as satisfactory with no policymaking or confidential function. Respondents maintained that their failure to obtain the sponsorship of a member of the Democratic Caucus was the sole reason they were not reappointed. Respondents both admitted that no one conditioned their reappointment on Respondents willingness to change their party registration, contribute money to the Democratic Party or support the Democratic Party in any way.

Petitioner and his witnesses maintained that although the Democratic Caucus could and did submit recommendations to the Petitioner for his consideration, the Petitioner had the right to refuse those recommendations and ultimately, his choice was final. No one conditioned Petitioner's appointment as Public Defender upon an agreement to hire or fire anyone. Petitioner described Respondents as "competent attorneys" but based upon Petitioner's experience as an Assistant District Attorney, Respondents were not competent Assistant Public Defenders for a variety of reasons described in depth in the record. Petitioner felt that since his assistants are an extension of the Public Defender in each of the courts in which they appear, they must, of necessity, enjoy a confidential relationship with him.

James Anderson, the County personnel officer, testified that assistant public defenders are in the "exempt" class meaning that these persons carry out "major functions of the principal as though the principal were present" or that they served in a confidential capacity. Of the approximately 2000 County government employees, less than 50

served in the "exempt" class which included all of the assistant public defenders, assistant district attorneys and some of the assistant county attorneys. These were considered "confidential" positions.

After non-jury trial, District Court Judge Vincent L. Broderick on September 29, 1978, issued his decision permanently enjoining the Petitioner, Branti, from terminating the employment of Messrs. Finkel and Tabakman as Assistant Public Defenders on the sole ground of their political beliefs.

On October 10, 1978, Judge Broderick signed final judgment in this case. On February 20, 1979, the Circuit Court of Appeals unanimously affirmed Judge Broderick's decision.

REASONS FOR GRANTING THE WRIT:

I. By characterizing the positions of assistant public defender as non-policymaking and non-confidential, the Second Circuit has virtually eliminated political factors in the selection of persons for positions other than department heads. We believe this to be a misinterpretation of Elrod v. Burns and contrary to Mr. Justice Stewart's concurrence therein. Attorneys are not deputy sheriffs,

clerks, typists or janitors. They generally exercise a high degree of discretion and responsibility. The District Court Judge defined policymaking and confidential as it relates to governmental administration. However, we do not believe the Supreme Court in Elrod v. Burns wished to limit policy-making and confidentiality to supervisory or administrative duties.

As Judge Campbell, in his concurring opinion in Illinois State Employees Union, Council 34, etc. v. Lewis, stated:

> "it is simple enough to say that janitors, clerk-typists and elevator operators are 'non-policymaking' employees, but how far up in the bureaucratic echelon can a distinction be judicially drawn . . . The difficulty arises in attempting to fashion an appropriatiate and workable judicial standard for distinguishing between 'policymaking' and 'non-policy-making' positions." 473 F. 2d 561, 578 (1972) Cert. denied 413 U.S. 928 (1973).

And, the Harvard Law Review recently stated:

> "no clear line can be drawn between policymaking and non-policymaking positions. Elevator operators and janitors clearly fall within the court's proscription of patronage firings and department heads clearly do not; the applicability of the Elrod decision to the broad range of jobs in between these extremes remains to be resolved on a case by case basis." 90 Harvard Law Review 56, 194

In Newcomb v. Brennan, 558 F. 2d 825, Cert. denied 434 U.S. 968, the Circuit Court of Appeals for the Seventh Circuit held that a deputy city attorney is a policymaking position.

It is apparant that the decision in Elrod presents practical problems for the Circuits in determining what is or is not a policymaking and/or confidential position. We believe it is in the interest of this Court to more accurately define what it meant by policymaking and confidential, if only to avoid thousands of future lawsuits by those now holdir ɜ exempt-patronage positions in local governments throughout the United States.

A more workable and reasonable guide was suggested by Judge Campbell in the Illinois v. Lewis case. Judge Campbell suggests at page 578 that

> "the constitution would permit a public official to hire or dismiss on the basis of political association any employee engaged directly or indirectly in the

> formulation or implementation of the policies of the particular governmental office or agency." (emphasis added)

Assistant public defenders are the alter egos of the public defender and must have his trust and confidence in order to properly perform their duties. Surely, assistant public defenders, charged with the duty of the legal representation of the poor, should not be catagorized with janitors. Is not confidentiality an intricate part of any practicing attorney's trade whether he be an Assistant United States Attorney, Assistant State Attorney, Assistant District Attorney, Assistant County Attorney or Assistant Public Defender? In fact, are not attorneys, by reason of their professional duties, in a confidential reationship with their department heads as well as their clients?

The Circuit Court and District Court seemed to ignore the fact that only fifty positions are designated as being in the "exempt" class of the civil service out of two thousand Rockland County employees. This is directly opposite to the facts in Elrod where over 50% of the Cook County Sheriff's Department alone were in the exempt class.

The Rockland County Civil Service Commissioner testifed that fifty positions including assistant public defenders were put in the exempt class because of the confidential aspects. We believe that it was clear error not to follow that testimony as controlling on the issue of policymaking and confidentialty.

The rulings below will have the effect of establishing a class of the civil service for exempt employees without them having to take examinations, thereby discriminating against those employees who were required to take an examination.

The rulings below would have a serious effect on the ability of political parties to promote the governmental employment of young attorneys which would enable those attorneys to obtain the experience necessary to subsequently hold high level appointive or elected positions. It would therefore, remove the bottom rungs of the ladder of political ascendency leaving only the wealthy as future candidates for Congress, the United States Senate and the Judiciary.

The ruling could conceivably limit affirmative action in the public sector, in

that minorities, now graduating from our law schools in greater numbers will be discouraged from becoming involved in the political process since all patronage positions for which these graduates would be eligible would have already been filled with "lifetime" appointments.

If the Second Circuit wished to virtually eliminate the so-called patronage system, the rulings below insured that result.

II. The Respondents failure to obtain sponsorship of a political caucus without the other coercive acts usually associated with sponsorship did not deprive Respondents of freedom of association.

We believe the record is clear that their was no requirement that the Respondents obtain the sponsorship of a member of the Democratic caucus. Assuming arguendo that Respondents were required to obtain the sponsorship of a member of a political caucus in order to secure reappointment, the record is devoid of any conduct or attempt on the part of the Petitioner or any member of the caucus to violate Respondents' constitutional rights by attempting to coerce Respondents

into either changing party registration, contributing money to a particular party or supporting party's candidates. The record does show, however, that Respondents were ignored during the recommendation process by the political caucus. If ignoring one from the recommendation process causes a deprivation of constitutional rights, may not every other attorney in Rockland County argue that they also were deprived of their constitutional rights since they also were not considered?

WE ARGUE THAT, ABSENT COERCION, THE NECESSITY FOR OBTAINING SPONSORSHIP FOR GOVERNMENTAL EMPLOYMENT DOES NOT DEPRIVE ANY ONE OF THEIR CONSTITUTIONAL RIGHTS.

The Respondents, <u>part-time</u> employees, who obtained their present positions through the political process and more importantly actually sought to retain these same positions through the same political process have waived any right to object to their replacement.

Respondents have not come into court with clean hands. Respondents made use of the political system when they sought to retain their jobs. It was only after they

were unsuccessful that they claimed constitutional deprivation.

III. The rulings of the Circuit and District Courts that Plaintiffs were fired for political reasons were clearly erroneous in that under Mount Healthy City Board of Education v. Doyle 429 U.D. 274 and Givhan v. Western Line Consolidated School District, --U.S.--, 58 LEd 2d 619 (1979), the defendant did in fact come forward with a legitimate "same decision any way" defense. It was the defense contention at trial and remains so today that, political considerations aside, Petitioner would not have reappointed the Respondents for a variety of legitimate reasons set forth in the record.

IV. In Ramey v. Harber, 589 F. 2d 753 (1978), the Court of Appeals for the 4th Circuit reversed the District Court's opinion and found significant factual differences from Elrod v. Burns, such as no coercion and no discharge.

The Court stated at page 757 that

> "The factual distinctions discussed above raise a question as to the applicability of Elrod in view of the fact that the concurrence of Justices Stewart and Blackman in the plurality opinion ex-

> plicitly limited the Court's holding to patronage dismissals. . . .
>
> The district court's decision is supported by the broad sweep of the Elrod plurality, but there is considerable uncertainty as to how a majority of the Supreme Court would treat a failure to rehire and other patronage practices."

We submit that the case at bar involves patronage practices which clearly lack any type of coercion and involves a failure to reappoint after a term has expired. Therefore, we believe that the 4th Circuit ruling in Ramey and the rulings below in this case amount to a conflict in the Circuits.

CONCLUSION

Wherefore, the Petitioner respectfully prays that a writ of certiorari be issued.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

For The Second Circuit

(Argued January 1979, Decided February 20, 1979)
Docket No. 78-7494

AARON FINKEL and ALAN TABAKMAN,
Plaintiffs-Appellees

--v.--

PETER BRANTI, as Public Defender of Rockland County,

Defendant-Appelant.

B e f o r e :

MOORE, MANSFIELD, Circuit Judges, and
WYATT, District Judge

This is an appeal from a judgment of injunction entered after a non-jury trial by Judge Broderick in the Southern District of

New York. The appellant, Public Defender of Rockland County and a Democrat, was permanently enjoined from terminating the employment of the two appellees, Republicans, as Assistant Public Defenders. Judge Broderick found that appellant had attempted to terminate their employment on the sole ground of their political beliefs. This judgment must be and is affirmed.

We are convinced that the District Court's findings and conclusions are not clearly erroneous. Fed. R. Civ. P. 52(a). Within the meaning of that standard, we have not formed "the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum co., 333 U.S. 364 (1948).

It is clear that, under Elrod v. Burns, 427 U.S. 347 (1976), the appellees are entitled to the relief granted by the District Court.

We note the reliance of appellant on Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). That decision was that when constitutionally protected conduct is asserted as having caused a wrongful discharge or refusal to renew

employment, the employer may defend by showing that he "would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." 429 U.S. at 287. Since Judge Broderick found that the attempted termination of employment in the case at bar was "solely" for political beliefs, a finding not clearly erroneous, his decision was wholly consistent with Mount Healthy.

An argument for appellant, stated in his brief and emphasized in oral argument, is that Assistant Public Defenders occupy a "policymaking" position (427 U.S. at 367), are confidential employees, and are thus not protected by the principle of Elrod v. Burns. The argument is attempted to be made from the fact that the position of Assistant Public Defender is in the "exempt class", that is, exempt from the provisions and protections of the New York Civil Service Law, specifically, Article 5, Section 75, of that Law. It is asserted that to be in the exempt class, a position must be found to be that of a policymaker or confidential employee. There is no basis for such an assertion. The exempt class has nothing to do with policy-

making or confidentiality. The exempt class is defined in the Civil Service Rules and Regulations (§ 2.1(a)) as follows: "Positions in the exempt class are those, other than unskilled labor positions, for which competitive examinations or other qualification requirements are not practicable." It was even asserted at oral argument that an Assistant Public Defender is called a policymaker by the Civil Service Regulations. Our research has not led to any verification of the assertion; nothing of this sort has been found in the Regulations. We have no doubt that Judge Broderick was correct in concluding that an Assistant Public Defender was neither a policymaker nor a confidential employee.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AARON FINKEL and ALAN TABAKMAN, : 78 Civ. 14 (VLB)

Plaintiffs, :

-against- : Opinion

PETER BRANTI, JR., as Public Defender, Rockland County, :

Defendant. :

----------X

VINCENT L. BRODERICK, U.S.D.J.

I.

Plaintiffs, Aaron Finkel and Alan Tabakman, are Assistant Public Defenders ("Assistants") employed by the County of Rockland, New York. Defendant Peter Branti is the Public Defender for Rockland County. Finkel and Tabakman were appointed to their positions as Assistants on March 26, 1971 and September 5, 1975, respectively.

The six-year term of the Public Defender expired on December 31, 1977. Frank P. Barone, a Republican, had served in that position since January 1, 1972. He had been appointed

by a Republican-dominated County Legislature. In 1973 the Democrats gained control of the Rockland County Legislature, and in the 1977 election (County legislators serve four-year terms) a Democratic majority was again elected.[1]

Defendant Branti, a Democrat, had been an Assistant District Attorney for Rockland County. He was selected as Public Defender by the Democratic caucus of the County Legislature, and was appointed by the Legislature on January 3, 1978. On that date, he began the process of executing termination notices for six of the nine Assistants who had served under Barone.[2] Plaintiffs were among the six Assistants whose employment Branti sought to terminate.

On January 4, 1978, plaintiffs commenced this action and, by order to show cause, sought a temporary restraining order and a preliminary injunction enjoining defendant from terminating plaintiffs' employment and from attempting to alter plaintiffs' employment status. Plaintiffs alleged that they were non-policymaking, non-confidential government employees who were satisfactorily performing their duties and that, therefore, defendant's attempt to replace plaintiffs on political grounds violated the First and Fourteenth Amendments.[3]

On January 4, 1978, I issued the requested temporary restraining order, which was to remain effective pending the development of a factual record at a hearing that was to be held on January 6, 1978. That hearing was held, but the evidence presented was, in my judgment, insufficient to enable me to resolve the difficult issues presented. I scheduled further hearings, which were held on January 24, 25, 26, 27 and 30, and February 8 and 10, 1978. Pursuant to Rule 65, Fed.R.Civ.P., and upon the consent of all the parties, the plenary trial was advanced and consolidated with the hearing on the preliminary injunction.

II.

The question to be decided herein may be narrowly stated as follows: Are plaintiffs non-policymaking, non-confidential government employees who, solely for political reasons, are threatened with removal from jobs they are competent to perform and have been satisfactorily performing? See Elrod v. Burns, 427 U.S. 341, 375 (1976) (Stewart, J., concurring). On the basis of the evidence presented at the hearings and the applicable law, I find that the answer to this question is "yes," and I conclude that defendant Branti must be enjoined from terminating or attempting to terminate plaintiffs' employment upon the sole grounds of their political beliefs.[4]

III.

The Rockland County Public Defender is appointed by the County Legislature for a term of six years. Assistants are appointed by the Public Defender, and they serve at his pleasure. The County Legislature makes appropriations for the salaries to be paid to Assistant Public Defenders.

Plaintiff Finkel has been employed as an Assistant since March 26, 1971, at which time he was appointed by Public Defender Arnold Becker, a Democrat. In January, 1972, Finkel was continued in office by Barone, who was a registered Republican who had been named as Public Defender by the Republican-dominated Legislature after Becker's term had expired. Barone served a full six-year term, and Finkel was an Assistant during that entire period. Throughout the course of his employment as an Assistant, Finkel himself has been a registered Republican.[5]

Plaintiff Tabakman was appointed as an Assistant by Public Defender Barone in September, 1975. At that time Tabakman was, and he has since then remained, a registered Republican.

There are some 2,000 public employees in Rockland County, falling into categories of "unclassified" and "classified." The unclassified category consists of teachers and elected

officials -- legislators and the District Attorney. The classified category has four subdivisions:

a) a competitive class with minimum qualifications and competitive civil service examinations;

b) a non-competitive class with minimum qualifications but no examination;

c) a labor class, consisting of unskilled labor.

d) an exempt class, for which no examination is deemed practicable or feasible.[6]

There is no executive in Rockland County; the Legislature performs the function of executive in appointing department heads, and members of the exempt class are generally appointed by a department head. Included in the less-than-50 employees who fall into the exempt class are Assistant County Attorneys, who are appointed by the County Attorney (who is in turn appointed by the Legislature), and Assistant Public Defenders, who are appointed by the Public Defender.

As a practical matter, appointments by the Legislature were decided upon, after the 1977 elections returned a Democratic majority of legislators, by the Democratic caucus. In November and December of 1977, the Democratic caucus of the Legislature decided it would allocate coveted positions on a town basis. The positions covered by these allocations

included not only those positions which were clearly within the appointing authority of the Legislature, such as Chairman of the Legislature, County Clerk, County Attorney and Public Defender, but also positions which were clearly not, such as Assistant County Attorneys and Assistant Public Defenders.

The Chairman of the Legislature and the County Clerk were from the Town of Ramapo, and the County Attorney and the Public Defender, Branti, were from the Town of Haverstraw. The Democratic caucus therefore decided that the attorney positions in the County Attorney's Office and in the Public Defender's Office would be filled by persons selected by the Democratic legislators or Democratic town chairmen from Rockland County's towns on the following bases:

Ramapo - six attorneys

Clarkstown - four attorneys

Orangetown - one attorney

Stony Point - one or two attorneys

Haverstraw - none[7].

The names selected were to be submitted to the appointing authority by the Democratic chairperson of the County.

Branti, after appointment as Public Defender, appointed six new Assistants and retained three who had been in the office under Barone. With one possible exception, all the attorneys appointed or retained by Branti were selected on the basis that had been decided upon by the Democratic caucus. With one exception, all were Democrats.

The names of the nine 1978 appointees for Assistants, their political affiliations, and the way in which the names were submitted are as follows:

(1) John E. Allison; newly appointed - submitted by Clarkstown delegation of the Legislature. Democrat.

(2) Lorna R. Bernard; newly appointed - submitted by Democratic chairman of Orangetown. Democrat.

(3) Gerard M. Blumenfeld; newly appointed - submitted by Harriet Cornell, Chairperson of the Rockland County Democratic Committee. Democrat.

(4) John A. Costa; newly appointed - submitted by Clarkstown delegation of the Legislature. Democrat.

(5) Wayne R. Feinberg; newly appointed - submitted by Stony Point delegation of the Legislature. Democrat.

(6) John F. McAlevey; retained - submitted by Ramapo delegation of the Legislature. Democrat.

(7) John M. McCabe; newly appointed - submitted by a legislator from Haverstraw. Democrat.

(8) William K. Nelson; retained - submitted by Clarkstown delegation of the Legislature. Democrat.

(9) Manuel Sanchez; retained - Frank Mascola, a Republican and Chairman of the County Legislature in 1973, had proposed Sanchez's name to Democratic Legislator Goodfriend of Ramapo. Marilyn Troy, Chairperson of the Clarkstown Democratic Committee, agreed to accept a resume from Sanchez. No party affiliation.[8]

In this light it is important to consider the fate of plaintiff Tabakman in comparison with the fate of Manuel Sanchez, whose name finally was submitted. Although, as noted above, Marilyn Troy, the Clarkstown Democratic Committee Chairperson, agreed to accept a resume from Sanchez, she stated that she thought it would be difficult for her to support or assist Tabakman, who had been very active in the campaign of Hon. William Wray, Jr., a Republican, for the position of County Judge. Legislator Goodfriend had expressed the same sentiments with respect to Tabakman.

Despite the pattern that is apparent in the above facts, defendant Branti has contended that he, and not the powers

in the Rockland County Democratic Party, was responsible for the appointment of the Assistants, and he has contended that he had particular and non-political motivation for each of his appointments. However, having heard all the evidence and based on the full record, I conclude that no person was considered for a position as an Assistant unless his or her name was submitted in accordance with the procedure decided upon by the Democratic caucus. What defendant Branti retained was, at most, a veto power over the names of the prospective Assistants which had been submitted to him. The exercise of that veto power would not have permitted Branti to substitute the name of a person whom he had decided to appoint for reasons independent of political affiliation; a veto would have led to the submission of a further name or names in accordance with the procedure which the Democratic caucus had decided upon.

An examination of the selection process that was employed in arriving at the name of each of the nine 1978 appointees shows that the hiring decisions were, for all practical purposes, made by Democratic legislators or chairpersons in accordance with the procedures that had been decided upon by the Democratic caucus and, with respect to every selection save that of Sanchez, those procedures excluded from consideration candidates who were affiliated with a party other than the Democratic Party. Moreover, the evidence

shows that the only reason for which Branti sought to terminate plaintiffs as Assistants was that they were not recommended or sponsored pursuant to the procedures that had been decided upon by the Democratic caucus.

IV.

Plaintiffs argue that defendant's attempt to exclude them from their government jobs, which jobs they had been performing satisfactorily, upon the sole ground of their political beliefs constituted a violation of the First and Fourteenth Amendments.

The leading case on the issue presented is Elrod v. Burns, 427 U.S. 347 (1976). In Mr. Justice Brennan's plurality opinion in Elrod, which was joined in by Justices White and Marshall, the question presented was stated to be "whether public employees who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments." Id. at 349. After an extended analysis of the facts of the case and the relevant constitutional principles, the plurality answered that question in the affirmative and concluded that plaintiffs therein had stated a cause of action.

The key to the plurality's conclusion was its holding that:

> In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

Id. at 363 (footnote omitted). The plurality applied this test to the practice at issue in Elrod -- a practice that involved the newly elected Cook County Sheriff's replacement of all non-civil service employees who were not members of his own Democratic party and who were not sponsored by one of its leaders. Application of the test to that practice led the plurality to conclude that the practice must be struck down as unconstitutional because none of the government interests was sufficiently compelling, in the context of "least restrictive alternative" analysis, to warrant the upholding of the practice. Thus, the plurality rejected defendant's argument that the disputed practice was necessary to insure an efficient and well-coordinated work force on the grounds that that goal could be achieved by less restrictive alternatives, namely, (1) discharge of employees for inefficiency on a case-by-case basis and (2) the use of merit

systems. Id. at 364. Defendant's argument that the practice was necessary to avoid the thwarting of the policies of duly elected officials was rejected on the grounds that that goal could also be achieved by a less restrictive alternative, namely, the use of the practice only in the case of employees in policy-making positions. Id. at 367. Defendant's argument that the disputed practice was necessary to the preservation of the party system and hence of the democratic process was rejected on the grounds that the practice was not the least restrictive alternative whereby that goal could be obtained because there had been no showing that the destruction of the disputed patronage practices would result in the destruction of the party system. Id. at 368. The plurality concluded that defendant had failed to meet the applicable test and that plaintiff had stated a cause of action. Id. at 373.

The concurring opinion by Mr. Justice Stewart, which was joined in by Mr. Justice Blackman and which is significant because the Justices joining in it are necessary components of the Court's majority, identifies the "single substantive question" presented by Elrod to be "whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." Id. at 375.

It has been assumed by the parties here that the holding of the concurrence in Elrod constitutes the rule of that case because, given the division of the Court, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds. ..." Marks v. United States, 430 U.S. 188, 193 (1977), quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976). See also Ramey v. Harber, 431 F.Supp. 657, 662 (W.D. Va. 1977) (Elrod read in accordance with the "least common denominator" test of Marks v. United States and Gregg v. Georgia). I conclude that plaintiffs herein must prevail even if the Elrod concurrence is taken to be the applicable law. However, in my judgment, Elrod need not be read so narrowly as the "least common denominator" test would suggest it need be.[9]

I turn now to an application of the holding of the Elrod concurrence to the instant case.

A. Plaintiffs Were Non-policymaking, Non-confidential Government Employees

Policymaking

The relevant case law provides several useful principles to aid the determination of whether plaintiffs are "non-policymaking employees" in the Elrod sense.

Assessment of whether or not plaintiffs are "policymakers" in the relevant sense must begin with an examination of Elrod itself. Therein, in the plurality opinion of Mr. Justice Brennan, the following discussion of this issue occurs:

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals. Thus, the political loyalty "justification is a matter of proof, or at least argument, directed at particular kinds of jobs." Illinois State Employees Union v. Lewis, 473 F.2d at 574. Since, as we have noted, it is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular respondent will rest on the petitioners on remand, cases of doubt being resolved in favor of the particular respondent.

Elrod, 427 U.S. at 367-68 (emphasis added). Thus in assessing whether plaintiffs herein are policymakers, it must be

asked whether plaintiffs have responsibilities that are not well-defined or that are of broad scope and whether plaintiffs act as advisors or formulate plans for the implementation of broad goals. Moreover, Elrod counsels that, if there is any doubt about these matters, it is to be resolved in favor of plaintiffs.

The general tests enunciated in Elrod have been restated more recently in cases in which the issue concerned public employees' political beliefs. Thus in Ramey v. Harber, 431 F.Supp. 657 (N.D. Va. 1977), a case very like Elrod in respect to its facts and its holding, the court ruled that "[f]or the purposes of the present case, the court has considered a policymaker to be one who controls or exercises a role in the decision making process as to the goals and general operating procedure of the office." Id. at 666 n.15. The court in Ramey, like the Elrod Court, considered the function of decision-making with respect to broad goals to be crucial to the concept of "policymaking." In this light the court in Ramey gave the following example: "[T]he decision to make a specific arrest would be a nonpolicy-making act while a decision to concentrate on certain types of crime would be that of a policymaker." Id.

Further elucidation of the concept of policymaking is to be found in Newcomb v. Brennan, 558 F.2d 825 (7th Cir.), cert. denied, 434 U.S. 968 (1977). In that case, plaintiff had been a Deputy City Attorney and, as such, had stood in a position between the City Attorney and the Assistant City Attorneys. Plaintiff had been dismissed when, against the wishes of the City Attorney, he announced his intention to run for Congress. 558 F.2d at 826-27. The district court, apparently using the mode of analysis employed by the Elrod plurality, decided that the state's interest in being able to dismiss plaintiff for political reasons outweighed plaintiff's First Amendment interests because plaintiff was a policymaker. Id. at 829. On appeal, the Seventh Circuit affirmed, holding, inter alia, that plaintiff had been a "policymaker" in the Elrod sense. In so holding, the Court of Appeals relied on the facts (1) that plaintiff had been given all the duties imposed by law on the City Attorney, including conducting all the law business of the city, drafting ordinances, and supervising Assistant City Attorneys; and (2) that, under the Milwaukee City Charter, plaintiff was in line to succeed the Mayor of Milwaukee if a vacancy occurred in that office. Id. at 829. On the basis of those facts, the Court of Appeals

concluded that "plaintiff's duties were of the 'broad scope' which the Elrod Court equated with a policymaking function." Id.

Application of the principles and examples stated in Elrod, Ramey, and Newcomb to the instant case leads me to conclude that plaintiffs herein are "nonpolicymaking employees."

Although it may be true that, with respect to particular cases that they handle, plaintiffs have responsibilities that are not well-defined and are of broad scope, see Elrod, 427 U.S. at 367-68, it is also true that, with respect to the overall operation of the Public Defender's Office, plaintiffs have very limited, if any, responsibility. For example, plaintiffs do not pass upon the issue of an indigent's eligibility for representation under the Federal Defender Program. Nor do plaintiffs act as advisors or formulate plans for the implementation of the broad goals of the office.

The discussion of "policymaking" in Elrod and the examples of "policymaking" given in Ramey and Newcomb show that the kind of responsibilities that plaintiffs have do not constitute plaintiffs policymakers. Plaintiffs make decisions in the context of specific cases; they do not make decisions about the orientation and operation of the office in which they work. Thus their decisions are more like the non-policymaking decisions "to make a specific arrest," Ramey, 431 F.Supp. at 666 n. 15, than they are like the policy-making "decision[s] to concentrate on certain types of crime. ..." Id. Similarly, plaintiffs' duties are not of the

"broad scope" of the Newcomb Deputy County Attorney's duties, e.g., drafting ordinances, and supervising Assistant County Attorneys, which broad-scoped duties led the court to conclude that the plaintiff Deputy County Attorney was a policy-maker.

Confidentiality

The concurring opinion in Elrod also requires that plaintiffs were "nonconfidential" employees. Elrod, 427 U.S. at 375.

Defendant argues that plaintiffs, as Assistants, are extensions of the Public Defender with whom they serve, and that they are in a confidential relationship with both their clients and with the Public Defender himself. Although there is a scarcity of case law on the issue of what constitutes "confidentiality" in this context, I find that plaintiffs are not confidential employees in the required sense.

In Elrod and its progeny, the requirements of "nonpolicy-making" and "nonconfidentiality" are discussed in a manner that makes clear that the concepts are related to one another. More specifically, the discussion in the cases suggests that the concept of confidentiality is ancillary to the concept of policy-making. An employee is a "confidential employee" if he or she stands in a confidential relationship to the policymaking process, e.g., as an advisor to a policymaker,

or if he or she has access to confidential documents or other materials that embody policymaking deliberations and determinations, e.g., as a private secretary to a policymaker.

In light of this relationship between the concepts of confidentiality and policymaking, I conclude that plaintiffs herein are non-confidential employees. The mere existence of the attorney-client relationship between plaintiffs and their clients does not militate against this conclusion. Nor does the existence of a "confidential" relationship between plaintiffs and the Public Defender; plaintiffs stand in a confidential relationship to the Public Defender qua attorney, i.e., in his role of supervisor of their cases, and not qua policymaker, i.e., in his role of decisionmaker about the orientation and operation of the office. Therefore, whatever confidential relationship may exist between plaintiffs and their clients, and between plaintiffs and the Public Defender, does not render plaintiffs "confidential employees" in the relevant sense.

B. Plaintiffs Were Satisfactorily Performing Their Jobs

Application of the Elrod concurrence requires that, in order for plaintiffs to prevail herein, they also have

been satisfactorily performing their jobs as Assistants. Elrod, 427 U.S. at 375.[10]

The key consideration on this issue is the evaluation of Frank Barone, who was the Public Defender under whom both plaintiff Finkel and plaintiff Tabakman had served -- Finkel for six years and Tabakman for more than two years. Barone considered both Finkel and Tabakman competent attorneys who were satisfactorily performing their duties as Assistant Public Defenders, and he would have reappointed both plaintiffs as Assistants if he had remained in the position of Public Defender.

Another consideration on the issue of competence is the assessment of defendant Branti, who had had the opportunity, in his role as Assistant District Attorney, to observe the performance of plaintiffs in their role as Assistant Public Defenders. He rated both Finkel and Tabakman as "competent attorneys."[11]

I conclude that plaintiffs have been satisfactorily performing their jobs as Assistant Public Defenders.

C. Plaintiffs Were Not Reappointed Solely Because of Their Political Beliefs

The third and final requirement of the Elrod concurrence is that the attempt to remove plaintiffs from their jobs have been based upon the sole ground of their political beliefs. Elrod, 427 U.S. at 375. I find that this requirement has been satisfied.

Defendant argues that, as to each plaintiff, there was at least one ground for non-renewal other than political beliefs.

As to plaintiff Finkel, defendant contends that, in the fall of 1977, defendant became aware of an incident wherein Finkel allegedly betrayed the confidence of the Public Defender by forewarning the County Attorney of a litigation strategem that was to be employed by the Public Defender's Office. Whether or not defendant ever in fact actually learned of such an incident I need not now decide because I find that, even if defendant did learn of such an incident, the incident was not a ground for defendant's decision not to renew plaintiff Finkel. Defendant's contention about the alleged incident is merely a post hoc rationalization that defendant devised late in the hearing process in an effort to thwart what was apparently perceived to be plaintiffs' promising development of the case.

As to plaintiff Tabakman, defendant asserts that one ground for the decision not to renew was the existence of an ethical conflict between Tabakman and Hon. William Wray, Jr., Town Justice for Clarkstown, both of whom were members of the same law firm. I find that defendant never even considered this alleged conflict until after his hiring decisions had been made and the instant litigation had been commenced. In short, the possibility that Tabakman was in a position of ethical conflict was not a ground for his non-renewal.

The sole grounds for the attempted removal of plaintiffs were the facts that plaintiffs' political beliefs differed from those of the ruling Democratic majority in the County Legislature and that the Democratic majority had determined that Assistant Public Defender appointments were to be made on political bases. Under the law as announced in Elrod, defendant's attempt to remove plaintiffs constituted a violation of their First Amendment rights.[12]

Defendant, when he was approached by Finkel regarding the possibility of reappointment, said, in effect, that the matter was out of his hands. In short, the matter was one of party politics, and the question of the merit of

any particular candidate was largely irrelevant. Faced with a similar fact situation, the court in Ramey v. Harber reasoned as follows:

> Moreover, defendant's response to plaintiff's queries during the interim period is most telling. The plaintiffs were to take their questions to their defeated principal. The implication was clear: He (Harber) had been elected through the support of his party - Flanary had been defeated and the sorry state of affairs suffered by Flanary's employees was not to be placed at [Harber's] door. In such circumstances, merit, training, and experience were to be extraneous considerations. The court must find that the preponderance of the evidence, and the inferences reasonably drawn therefrom, establishes that plaintiffs were refused consideration for reappointment solely because of their political beliefs and affiliations.

Ramey, 431 F.Supp. at 666-67.

V.

I find that defendant's attempt to remove plaintiffs was based solely on their political beliefs.[13] Under Elrod and its progeny, plaintiffs are entitled to the relief sought herein. Accordingly, the requested injunction will issue.

This memorandum constitutes my findings of facts and conclusions of law under Rule 52, Fed.R.Civ.P.

Settle judgment on notice.

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
September 29, 1978

FOOTNOTES

1. Of the eighteen members of the Rockland County Legislature elected in 1977 to serve from January 1, 1978 through December, 1981, eleven are Democrats.

2. The nine incumbents and their respective party affiliations in 1977 were as follows:

Aaron Finkel	Republican*
James A. Fitzgerald	Democrat
Stuart M. Leudan	Democrat
John F. McAlevey	Democrat
William K. Nelson	Democrat
Manuel Sanchez	Not Registered
Barnet S. Selman	Republican
Alan Tabakman	Republican
William F. Wray, Jr.	Republican

Only McAlevey, Nelson, and Sanchez were reappointed.

* In February, 1977, Finkel, at the suggestion of the District Attorney of Rockland County, a Democrat, filed a change of party registration from Republican to Democrat, such change to become effective January 1, 1978. Finkel hoped thereby to enhance his chances of being reappointed as an Assistant when a new Public Defender, expected to be a Democrat, was appointed.

The record in the instant case shows, however, that despite Finkel's change in party registration, he was regarded by the relevant parties to be a Republican during the period herein in issue.

3. Plaintiffs do not allege a basis for federal jurisdiction in their pleadings. I shall construe this action, which is clearly based on Elrod v. Burns, 427 U.S. 347 (1976), to be brought pursuant to 42 U.S.C. §1983, with jurisdiction being based on 28 U.S.C. §1343(3).

4. On January 4, 1978, I signed a temporary restraining order that restrained defendant "from terminating or attempting to terminate, alter, change or in any way affect plaintiffs' current employment status as of December 31, 1977 as Assistant Public Defenders for the County of Rockland. ..." That restraining order remained in effect through the trial, and, on the last day of trial, I stated that that order would stay in effect until decision was rendered. Therefore, the injunction that is issued herein makes permanent the order of January 4, 1978.

Because there has been some dispute as to the interpretation of the January 4, 1978 order, I want to make clear that compliance with the judgment to be entered herein will require defendant both to permit plaintiffs to work as Assistants and to pay them the normal Assistant's salary. Mere payment of plaintiffs' salary will not constitute full compliance with the judgment entered herein; for plaintiffs' constitutional right, which is upheld herein, is the right not to be dismissed from public employment upon the sole ground of their political beliefs. Defendant cannot infringe that right of plaintiffs with impunity by the mere expedient of paying plaintiffs a sum of money.

5. See note 2, supra.

6. James K. Anderson, Personnel Officer of Rockland County, testified that with respect to the exempt class no examinations are feasible since the positions in this class are those of a deputy or a person in a confidential relationship to his principal.

7. The decision that no assistant attorney positions should be allocated to Haverstraw was apparently based on the fact that both the County Attorney and the Public Defender were from that town.

8. Sanchez is not registered with any political party, and he is the only non-Democrat whom defendant Branti appointed as an Assistant. In the case of the retention of Sanchez, a non-political factor was considered, namely, the fact that Sanchez speaks Spanish.

9. There are several reasons that support a broader reading of Elrod than the reading dictated by the "least common denominator" test.

First, there is the fact that three Justices joined in the plurality opinion. Given this fact, it cannot seriously be maintained that the plurality opinion is irrelevant to a determination of what is the holding of the Court. Even if it is conceded that the particular language of the concurring opinion must be taken as controlling, it is clear that the analysis and reasoning of the plurality is relevant to an elucidation of the holding of the concurring opinion. In one's effort to understand the rule of the case, it surely would not suffice to read only the concurring opinion.

Second, the particular mode of analysis employed by the plurality in Elrod, which analysis puts the burden of stating compelling interests on the defendant, has been employed in other cases, decided both before and after Elrod, in which the constitutionality of patronage practices was at issue. See, e.g., Newcomb v. Brennan, 558 F.2d 825, 829 (7th Cir.) (politically motivated dismissal was constitutionally acceptable only if state interest is of sufficient importance to justify infringement of plaintiff's constitutional rights), cert. denied, 434 U.S. 968 (1977); Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561, 572 (7th Cir.) (Stevens, Cir. J.) (interests of state, "if strong enough," may justify imposition of conditions on public employment; burden of establishing such justification rests upon the defendant), cert. denied, 410 U.S. 928, 943 (1972).

Third, both the concurrence and the plurality place heavy reliance on Perry v. Sindermann, 408 U.S. 593 (1973). See Elrod, 427 U.S. at 358-59; 360-61; 375. The language from Sindermann that both the plurality and the concurrence cite is as follows:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.
>
> * * *
>
> Thus, the respondent's lack of a contractual or tenure "right" to re-employment for the 1969-1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. Shelton v. Tucker, supra; Keyishian v. Board of Regents, supra. We reaffirm those holdings here.

408 U.S. at 597-98 (emphasis added).

That language, which is essential to the positions of both the Elrod plurality and the Elrod concurrence, shows how broadly Elrod may be read. For that language, unlike the language in Elrod itself, suggests that the wrongful reason for discharge need not be the sole reason in order to render the discharge unconstitutional. Sindermann leaves open the possibility that the mere fact that the wrongful reason is a substantial reason for the discharge will vitiate the discharge. That the Elrod Court, on the facts presented to it, arrived at a narrower holding does not necessarily limit the implications of Sindermann.

10. The fact that plaintiffs are removable at the will of the Public Defender is, of course, irrelevant to the determination of the constitutional issue presented herein. E.g., Perry v. Sindermann, 408 U.S. at 597; Rivera Morales v. Benitez de Rexach, 541 F.2d 882, 885 (1st Cir. 1976).

11. Testimony to this effect was given by Branti at the original hearing, and I accept it. At the second set of hearings Branti, apparently believing that the case was not going well, changed his testimony. I do not credit his later testimony, which was apparently structured to meet the perceived needs of the litigation as it developed.

12. It is important to note that the fact that defendant and the Democratic majority attempted to effectuate the removals at issue herein by an indirect process, with Branti acting as the agent for the Democratic majority, does not serve to distinguish this case from Elrod, wherein the Cook County Sheriff himself effectuated the constitutionally impermissible removals. The legal effect of the instant removals is the same as the effect in Elrod because it is the grounds for such removals, and not the process whereby they are carried out, that determines whether or not such removals are constitutionally permissible.

13. Perhaps not squarely presented in this action, but deeply disturbing nonetheless, is the question of the propriety of political considerations entering into the selection of attorneys to serve in the sensitive positions of Assistant Public Defenders. By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime? No "compelling state interest" can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans).

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Supreme Court, U. S.
FILED
AUG 8 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1654

PETER BRANTI, As Public Defender
of Rockland County

Petitioner,

vs

AARON FINKEL AND ALAN TABAKMAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED
APRIL 30, 1979
CERTIORARI GRANTED JUNE 25, 1979

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1654

PETER BRANTI, as Public Defender
of Rockland County,

Petitioner

--v.--

AARON FINKEL and ALAN TABAKMAN,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

PETITION FOR CERTIORARI FILED
APRIL 30, 1979
CERTIORARI GRANTED JUNE 25, 1979

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Please note that the opinions and judgments of the United States District Court and the United States Circuit Court of Appeals for the Second Circuit have already been printed as appendix to the Petition For Certiorari at pages 1A through 32A of said appendix.

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Docket No. 78 Civ. 14

Date	NR.	Proceedings
1-3-78	1	Complaint.
1-4-78	2	Plaintiffs' exparte motion for Temporary Restraining Order and Preliminary Injunction.
1-12-78	5	Affidavit in opposition to Plaintiffs' application.
9-5-78	20	Answer.
9-30-78	21	Opinion granting injunction.
10-10-78	23	Judgment for Plaintiffs issuing permanent injunction
10-10-78	24	Notice of Appeal.
11-1-78	26	Stipulation re: transmittal of sealed portions of trial record to United States Court of Appeals.

U. S. DISTRICT COURT
SOUTHERN DISTRICT, NEW YORK

----------X

AARON FINKEL and ALAN TABAKMAN,

Plaintiffs,

against

PETER BRANTI as Public Defender, Rockland County, and SAMUEL COLEMAN, Chairman, and JOHN MURPHY, DIANE BELJEAN, IRWIN BERNSTEIN, HEZEKIAH EASTER, THEODORE DUSANENKO, JAMES DAMIANI, EUGENE GROGAN, THOMAS MORAHAN, ANNE O'SULLIVAN, ISAAC GOODFRIEND, SANFORD RUBENSTEIN, HERBERT REISMAN, SAMUEL ZELMAN GDANSKI, JOHN MEEHAN, PHILIP ROTELLA, JOHN GRANT and RICHARD SULLIVAN, comprising the Rockland County Legislature,

Defendants.

----------X

78-Civ-14

Judge Broderick

ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER & A PRELIMINARY INJUNCTION

This cause came on to be heard on the application of plaintiffs upon the verified complaint herein and the affidavits of AARON FINKEL and DAVID MAC RAE WAGNER attached thereto, for a temporary restraining order, pursuant Rule 65 FRCP; and, it appearing to the court therefrom that immediate and irreparable injury, loss and damage will result to the plaintiffs before notice can

be given and the defendants or their attorneys can be heard in opposition to the granting of a temporary restraining order for the reason that the loss of first amendment freedoms for even minimal periods of time constitutes irreparable injury, it is

ORDERED, that defendants, their agents, servants, employees and attorneys and all persons in active concert or participation with them are hereby restrained from terminating or attempting to terminate, alter, change or in any way affect plaintiffs current employment status as of December 31, 1977 as Assistant Public Defenders for the County of Rockland, and it is further

ORDERED, that this order expire at 10 a.m. on 1/13, 1978, unless within said time it is for good cause shown extended for a longer period, or unless defendant consents that it may be extended for a longer period; and it is further

ORDERED, that Plpff file a bond as security in the amount of $500.00 by January 6, 1978;

ORDERED, that plaintiffs' motion for a preliminary injunction be set for hearing on 1/6, 1978, at 4:00 p.m., of that day or as

soon thereafter as counsel can be heard, in the United States District courtroom #401 in the city of New York, state of New York; before Honorable Vincent Broderick;

FURTHER ORDERED, that copies of this order be personally served upon Peter Branti and Samuel Coleman on or before 12 Noon on 1/5/78 and that copies thereof be mailed special delivery to each of the other named defendants on or before 1/4/78 at 5:00 p.m.

This order issued at 10:20 a.m. this 4th (1/4/78) day of January, 1978.

S/
UNITED STATES DISTRICT JUDGE

Same Caption

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs apply to the court, upon the verified complaint herein and the affidavits of AARON FINKEL and DAVID MAC RAE WAGNER attached hereto, for a temporary restraining order against the above-named defendants, their agents, servants, attorneys and privies, pending the hearing and decision of plaintiffs' motion for a preliminary injunction, enjoining them from terminating or attempting to terminate, alter, change or in any way affect plaintiffs current employment status as Assistant Public Defenders for the County of Rockland.

Yours, etc.

FREEDMAN, WRAY, WAGNER,
& TABAKMAN & FINKEL
Attorneys for Plaintiffs
11 Stokum Lane
New City, New York 10956
(914) 638 - 1400

Dated: New City, NY
January 3, 1978

Same Caption

AFFIDAVITS IN SUPPORT OF TEMPORARY RESTRAINING ORDER

STATE OF NEW YORK)
ss.:
COUNTY OF ROCKLAND)

DAVID MAC RAE WAGNER, being duly sworn, deposes and says:

1. Deponent is an attorney at law admitted to practice in the United States District Court, Southern District New York, is fully familiar with the facts and circumstances surrounding this action, and makes this affidavit in support of plaintiffs application for Temporary Restraining Order.

2. Plaintiffs bring this action pursuant to the first and fourteenth amendments of the Constitution of the United States interpreted by the United States Supreme Court in ELROD vs BURNS, 427 US 347, 96 S. Ct., 2673, 49L Ed.2 547.

Plaintiffs are non-policy making, non-confidential government employees satisfactorily performing their jobs and, therefore, cannot be discharged or threatened with discharge solely because of their political beliefs, which proposition

stated in the concurring opinions of Justices STEWART and BLACKMUN represents the "lowest common denominator" of the ELROD ruling, Ramey vs Harber, 431 F. Supp. 657 (D.C. W.D. Va. 1977, P. 662).

3, Plaintiffs' threatened discharge by defendants threatens their First Amendment freedoms and injunctive relief therefore clearly lies; "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury", Elrod vs Burns, Supra, P. 373.

Plaintiffs should not be required to give further notice to defendants of this application for a temporary restraining order. As set forth in exhibit A annexed hereto, and the complaint herein, plaintiffs notified defendants of their intention to remain employed in their present capacity; plaintiffs further, on January 3, 1978, reported for duty and were subsequently asked to return their files and informed that their respective court calendars for which they were to represent the Public Defender's office had been adjourned.

WHEREFORE, it is respectfully submitted that a temporary restraining order be issued

restraining the defendants, their agents and employees, from terminating or attempting to terminate, alter, change or in any way affect plaintiffs current employment status as Assistant Public Defenders for the County of Rockland.

S/
DAVID MAC RAE WAGNER

Sworn to before me this

3rd day of January, 1978.

S/

Same Caption AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ROCKLAND) ss:

AARON FINKEL, being duly sworn, deposes and says:

For the past seven years I have served without interruption as an Assistant Public Defender of Rockland County, part-time and full-time, under two Public Defenders of different political persuasion and legislatures of both Democrat and Republican control. I am 43 years old, have been employed in public positions for more than 20 years and have a vested pension interest.

Almost incredibly, my employment has been terminated without notice or hearing establishing just cause, and solely for political reasons, in violation of the First and Fourteenth amendments to the Constitution of the United States. On December 30, 1977, I joined with Assistant Public Defender Alan Tabakman in serving a demand for clarification and request to be continued. On January 3, 1978 Mr. Tabakman and I reported for work and obtained our files for the day but were asked to return

them. We did. We have still not been officially notified that we were terminated but our names have been replaced with others on the wall of the Public Defender's Office where messages and other memoranda are left for us.

In December, 1977 I was shocked to read in the Rockland County Journal News, the local newspaper, that the Democratic Caucus of the Rockland County Legislature had chosen various persons to replace all but two of the Assistant Public Defenders. I was one of those named to be replaced. A copy of that article is annexed. Never was I otherwise advised, formally or informally, that I was to be terminated or the reasons therefor.

When I was first employed as Assistant Public Defender, March 26, 1971, a duly sworn appointment dated March 29, 1971 was filed by Arnold Becker, Public Defender, with the County Clerk of Rockland County. A copy of that sworn and filed appointment is annexed. It would appear that my appointment was no less than permanent as permitted by Section 716 of the County Law of the State of New York.

Concurrently with my swearing in, the

Public Defender filed a Report of Personnel Change dated March 26, 1971, with the Rockland County Personnel Office. That form, a copy of which is also annexed, designates the appointment as being"PERMANENT" rather than any of the other alternatives provided by the form such as "PROVISIONAL", "TEMPORARY, UNTIL _____", or TERM OF OFFICE, UNTIL ____".

Read together, the two aforementioned documents are incapable of inference other than that I was appointed to a permanent position.

By letter dated April 2, 1971, Herschel Greenbaum, Chairman of the Rockland County Legislature, was notified by the Public Defender that I had been appointed to the position of Assistant Public Defender. That letter, a copy of which is annexed, likewise does not in any way limit the term of my appointment.

Mr. Becker, a Democrat, was not re-appointed Public Defender by the Rockland County Legislature when his term expired, December 31, 1971. Frank P. Barone, a Republican, was appointed by the then Republican controlled legislature, to a six year term, commencing January 1, 1972.

Both Mr. Becker and his successor, Mr. Barone, maintained non-partisan offices. At the time I was an enrolled Republican appointed by Mr. Becker, a Democrat.

Mr. Barone continued my employment without question and he duly filed a Report of Personnel Change with the Rockland County Personnel Office dated January 5, 1972 and sworn Appointment designating me Senior Assistant Public Defender. Those forms, copies of which are annexed, also showed me to be "PERMANENT" rather than any other of the provisional or temporary alternatives provided by the form.

Effective January 1, 1973, by Report of Personnel Change dated June 22, 1973, I was given a raise in salary. A copy of that form, filed with the Rockland County Personnel Office, is also annexed. It reveals no change in status. I was never advised of any change from permanent to temporary status until it was alleged in December 1977 in order to terminate me.

More than five years after my appointment and on or about Sepbember 5, 1975 another personnel form was filed designating me Assistant Public Defender and increasing my salary and hours. That form, then filed without my knowledge of its contents, showed

"TERM OF OFFICE, UNTIL 12/31/77". That error, for whatever reason, was again made in a similar form filed March 19, 1976. Now, only nine months later, it seems that it is sought as justification for terminating my employment in order to appoint a party faithful.

It would be absured to believe that the mere filing of a paper with the Office of Personnel, without my knowledge, can change the status created by the sworn filed appointment and original personnel document. The Public Defender himself was surprised to learn that his secretary began enterring termination dates for his employees concurrent with his own term. Annexed is a letter of Frank P. Barone, Public Defender, Rockland County, dated December 30, 1977 wherein he states the most recent forms mistakenly indicated I was to serve a term concurrent with his. The recent documents should be ineffective as a matter of law as well as for mistake of fact, whether or not motive is suspect.

Except for the two recent forms filed without my knowledge and by mistake on the part of the Public Defender himself, all sworn appointments and Reports of Personnel Change clearly showed me to be a permanent employee.

My service as an Assistant Public Defender had been highly regarded. I was commended by both Public Defenders under whom I served. Mr. Barone's letter dated December 30, 1977 expresses grateful appreciation for my services to the Office of Public Defender of the County of Rockland with the highest degree of professional responsibility and excellence. He further states in that letter that he would have been delighted to continue my employment.

I anticipate that it will be argued that I was serving a term that expired December 31, 1977. That is not true, as shown. However, even if it could conceivably be so held, it does not lend justification or propriety to the failure to continue my employment, flagrently violating my First and Fourteenth amendment rights. The United States Supreme Court has held that even an untenured teacher is entitled to be rehired, at the expiration of his contract term, if able to prove in some way that the only reason for not extending his contract was the teacher's exercise of First amendment rights. PERRY v. SINDERMANN, 408 U.S. 593(1972) S. Ct.

In the Perry case, not only did the teacher have no tenure in office but he was terminated at the expiration of a contractual term. This leaves, in the case at bar, only the issue of First amendment rights, which can be put to rest quickly. I do not think it will be denied that the Assistant Public Defender positions are being dealt with as political patronage. The legislators have openly treated the jobs as such. I have read correspondence between legislators showing their political involvement. The Rockland County Journal News has reported "The selections were actually made by the Democratic Caucus composed of the party's 11 county legislators." The political affiliation of the appointees, the documented statements of the legislators, the testimony of certain of the appointees, their proponents and the legislators, will overwhelmingly show my termination and replacement was the result of political patronage practise.

Patronage practise of discharging non-policy making employees for belonging to the losing political party was held invalid under the First and Fourteenth amend-

ments to the Constitution of the United States, ELROD v. BURNS, 427 U.S. 347, 96 S. Ct. 2673, 49 LED 2547(1976): RAMEY v. HARBER, 431 F. Supp. 657 (D. Ct., W. D. Va., 1977). An Assistant Public Defender enjoys no policy making functions. As an Assistant Public Defender I defended indigent clients of the Office of the Public Defender. The clients were selected by the Public Defender ~~or~~ the court using guidelines over which I had no control. I had no authority but to work in the various courts and on cases as the Public Defender directed. All policy was fixed by the Public Defender himself and articulated in memoranda or at periodic meetings. Every letter or document prepared by an Assistant Public Defender was reviewed by the Public Defender. The Public Defender was the sole administrator of the office and he made that fact well known.

If my employment is not continued and this litigation successful, the County of Rockland, my family and myself will suffer irreparable injury. The cost to the county of paying backpay and other damages without having the benefit of my employment will be substantial. My family will be without the

excellent health insurance provided by the county for its employees. That coverage, on a private basis, is extremely costly and there is then question as to whether the same coverage can be had. Naturally my family will be deprived of my week to week earnings in the interim. For this reason, I am moving by Order to Show Cause. No previous application has been made.

In short, the Democratic Caucus, with its life and death type of power of appointment of the Public Defender, has tried unlawfully to name all Assistant Public Defenders. The termination of my employment is violative of my First and Fourteenth amendment rights as expressed in ELROD v. BURNS, 427 U.S. 347, 96 S. Ct. 2673, 49 LED 2574(1976); PERRY v. SINDERMANN, 408 U.S. 593(1972) S. Ct.; and RAMEY v. HARBER, 431 F. Supp. 657 (D. Ct.; W. D. Va. 1977). Irreparable harm will result to the County of Rockland and myself if I am not continued in employment pending litigation. Certainly, employed for seven years under two Public Defenders in varying capacities as Assistant Public Defender, irrespective of their

politics or mine or the political control of the legislature, I had a legitimate "expectancy" of re-employment. PERRY v. SINDERMANN, 408 U.S. 593(1972) supra.

Dated: January 3, 1978
Spring Valley, New York

S/
AARON FINKEL

Sworn to before me this
3rd day of January, 1978.

S/
Notary Public

Same Caption

VERIFIED COMPLAINT

AARON FINKEL and ALAN TABAKMAN, by their attorneys, FREEDMAN, WRAY, WAGNER, TABAKMAN and FINKEL, complaining of the defendants herein, allege as follows:

1. Plaintiffs are Assistant Public Defenders employed by the County of Rockland; plaintiff AARON FINKEL was so appointed on March 26, 1971 (see exhibit A annexed hereto); plaintiff ALAN TABAKMAN was appointed on September 5, 1975.

2. Defendant, PETER BRANTI, is the Public Defender designee of the County of Rockland and upon information and belief will be appointed to that position by the County Legislature on or about January 3, 1978.

3. Defendants COLEMAN, MURPHY, BELJEAN, BERNSTEIN, EASTER, DUSANENKO, DAMIANI, GROGAN, MORAHAN, O'SULLIVAN, GOODFRIEND, RUBENSTEIN, REISMAN, GDANSKI, MEEHAN, ROTELLA, GRANT and SULLIVAN comprise the legislature of the County of Rockland having been elected as County Legislators for a legal term commencing on January 1, 1978.

4. On or about December 24, 1977, plaintiffs became aware through an article in the local

newspaper, the Journal-News, that defendant BRANTI had been selected to be the next Public Defender of the County of Rockland and, upon his appointment to that position, he would attempt to terminate their positions as Assistant Public Defenders (see exhibit B annexed hereto).

5. After learning of this attempted termination of their positions, plaintiffs, on December 30, 1977, informed defendant BRANTI in writing of their willingness and intent to continue in their positions as Assistant Public Defenders (see exhibit C annexed hereto).

6. On January 3, 1973, plaintiffs reported to the office of the Public Defender and were assigned court calendars in their capacity of Assistant Public Defenders for January 3, 1978. These assignments were made by the Chief Assistant Public Defender and subsequently plaintiffs were called by him and were advised that the court calendars at which they were to appear had been adjourned and they were directed to return their files to the Public Defender's office.

7. Based upon information and belief conversation with defendant BRANTI and articles appearing in the local newspaper, plaintiffs truly believe that it is the intention of the defendants to attempt to terminate plaintiff's employment because plaintiffs are Republicans and defendant BRANTI, a Democrat, having been appointed by a Democratic majority of the County Legislature, which wishes to replace plaintiffs with members of their own polital party.

8. The position of Assistant Public Defender is a non-policy making, non-confidential governmental position. Plaintiffs have satisfactorily performed their duties in their positions as Assistant Public Defenders and continue to do so (see exhibit D and annexed hereto).

9. Defendant's threatened termination of plaintiff's positions as Assistant Public Defenders without notice or hearing and without due cause is in violation of plaintiffs' federal rights pursuant to the first and fourteenth amendments of the United States Constitution and, therefore, raises

a material federal question.

WHEREFORE, plaintiffs pray for an injunction to be issued by this Court permanently enjoining defendants, their agents and employees, from terminating or attempting to terminate, alter, change or in any way affect plaintiffs current employment status as Assistant Public Defenders for the County of Rockland.

Yours, etc.,

FREEDMAN, WRAY,
WAGNER, TABAKMAN
and FINKEL
Attorneys for
Plaintiffs
11 Stokum Lane
New City, New York 10956
(914) 638-1400

Same Caption VERIFIED ANSWER

78 Civ. 14

Defendants by their attorney, MARC L. PARRIS, ESQ., County Attorney for the County of Rockland, answering the Plaintiffs' complaint allege as follows:

1. Denies knowledge sufficient to form a belief as to the allegations contained in paragraphs designated "4", "5" and "6" of Plaintiffs' complaint.

2. Denies the allegations contained in paragraph designated "7" of Plaintiffs' complaint and states as a matter of fact that Plaintiff, Aaron Finkel, changed his party registration to Democratic in February 1977 to take effect January 1, 1978.

3. Denies the allegations contained in paragraphs designated "8" and "9" of Plaintiffs' complaint.

4. Denies the allegations contained in paragraph designated "1" of Plaintiffs' complaint, except to admit that the Plaintiffs' are Assistant Public Defenders solely by force of the temporary restraining order issued in this action.

WHEREFORE, Defendants pray that the

Plaintiffs' complaint be in all respects dismissed and that Plaintiffs' application for a preliminary and permanent injunction be in all respects denied.

Dated: New City, New City
February 17, 1978

Yours, etc.,

MARC L. PARRIS, ESQ.
County Attorney,
County of Rockland
Attorney for Defendants
Office & P. O. Address
County Office Building
11 New Hempstead Road
New City, New York 10956
Tel. No. (914)638-0500

TO: FREEDMAN, WRAY, WAGNER & TABAKMAN, ESQS.
Attorneys for Plaintiff
11 Stokum Lane
New City, New York 10956
Att.: David M. Wagner, Esq.

Same Caption AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ROCKLAND) ss.:

ILAN SCHOENBERGER, being duly sworn, deposes and says:

That I am the Deputy County Attorney for the County of Rockland and make this affidavit in opposition to plaintiff's application for a temporary restraining order and preliminary injunction to restrain the County of Rockland in altering the plaintiff's current employment status. Attached hereto as exhibits are the affidavits of Public Defender, PETER BRANTI, Election Commissioner, ALEXANDRIA LEFEVER, and Personnel Officer, JAMES K. ANDERSON.

That for the plaintiffs to succeed in their application, they must show irreparable injury and the probability of success on the merits. If that cannot be shown, then the plaintiffs cannot succeed in obtaining the preliminary injunction.

The plaintiffs have alleged in their moving papers that they have been terminated because of their political beliefs and that this threatened or actual termination affects their first amendment freedoms. They cite the

case of ELROD v. BURNS, 427 U. S. 347, 49 L. Ed. 2d 547, 96 S.Ct. 2673, in support of their allegations. In the Elrod case, the respondents were Sheriff's deputies and low level employees discharged or threatened with discharge because of their non-affiliation with the political party of the newly elected Sheriff. That case exhibited facts which may be construed as insidious to the political process. The case states that as a condition to be retained in their employment they had to swear allegiance to the political party of the newly elected Sheriff, be affiliated with that party or be sponsored by that party. They also were coerced into supporting that party financially. There is no such allegation in plaintiff's affidavit herein.

That there is no infringement upon plaintiff's first amendment rights since the defendants at no time coerced the plaintiffs into supporting their party. The defendants at no time conditioned the retention of the plaintiffs on the support of the Democratic Party in Rockland County.

As was stated in MARKS V. UNITED STATES:

> "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" MARKS V. UNITES STATES, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L. Ed. 2d 260 (1977).

In the ELROD case, Mr. Justice Stewart concluded as follows:

> "The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing on the sole ground of his political beliefs. I agree with the plurality that he cannot. See PERRY V. SINDERMANN, 408 U.S. 593, 597-598. 92 S.Ct. 2694, 33 L. Ed. 2d 570." 427 U.S. at 375, 96 S.Ct. at 2690.

In the instant case, in order to fall within the holding of ELROD supra, four things must exist. First, the plaintiffs must be non-policymaking governmental employees. Secondly, the plaintiffs must be non-confidential governmental employees. Thirdly, they must be satisfactorily performing their job and fourthly, they must be discharged on the sole ground of their political beliefs.

Both plaintiffs are policymaking governmental employees. They appear at the Public Defender's Office and receive files to represent the Public Defender's Office at various Court appearances. Their latitude and discretion is broad. They appear in Court and upon each case, formulate a case by case policy on how to best represent the interests of those accused of crimes.

As was stated in ELROD, supra, 427 U.S. at pg. 367, 49 L.Ed. 2d, at pg. 562:

> "Non-policymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party."

And furthermore, at 427 U.S. 368 49 L.Ed. 2d 562:

> "An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policy-making position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals."

This is not a case of first impression. As was held in the matter of CLARKE v. O'BRIEN, 91 Misc. 2d 190, aff'd. 56 AD 2d 869, the case

involving an Assistant District Attorney who was discharged when a new District Attorney took office, the Court held at page 193:

> "The District Attorney cannot be expected to personally discharge his constitutional and statutory function in every case. For this reason he is authorized to appoint assistants and delegate and specify their duties.
>
> Subdivision 1 of section 702 of the County Law provides for the appointment of assistants by the District Attorney within his budgetary appropriation, and authorizes him to revoke performance by the Assistant District Attorney of such duties pertaining to the office as the District Attorney shall direct. Subdivisions 3 and 4 authorize the Assistant District Attorney to perform the duties of the District Attorney during the latter's absence or inability, and authorize designation of the order in which the assistants shall act where more than one is appointed.
>
> Petitioner and his former colleagues thus occupy unique and sensitive positions in the public service and, notwithstanding the number of assistants appointed, any one of them may by statute be called upon to discharge the powers and duties of their elected principal. The nature of the position requires that

> respondent be entitled to appoint and remove his assistants at will during his term."

And furthermore, the Court held:

> "To the extent that that the assistants discharge the statutory duties of the principal in the prosecution of crimes, the District Attorney must be the sole judge of their performance.
>
> The administrative organization and structure of the prosecutor's office and the particular assignment therein of an individual assistant cannot operate to convert an office posessing the statutory attributes of a deputyship into a subordinate clerical position. The criteria to be applied is the statutory authorization and the duties required of and delegated to petitioner and his compeers by the various duties statements."

An attorney is one of the prime examples of confidential relationship. There exists a confidential relationship between the Assistant Public Defender and the clients he represents. There also exists a confidential relationship between the Assistant Public Defender and his appointing officer, namely, the Public Defender. The Assistant Public Defender is a personal extension of the Public Defender in

the Court where he is representing the Public Defender's Office. In that Court, he formulates such policies and makes such determinations as he feels are necessary to accomplish his job. Since the position of Assistant Public Defender is a policy-making position and a confidential position, it does not come within the narrow construction of ELROD V. BURNS, supra.

The question as to whether Mr. Tabakman and Mr. Finkel are satisfactorily performing their jobs is a question for proper determination by the present Public Defender at whose pleasure they serve. Furthermore, the grounds for dismissal of Mr. Tabakman and Mr. Finkel are not the "sole ground" of their political beliefs. Their dismissal furthers a legitimate governmental interest as is shown in these papers.

That it is a matter of evidence that plaintiff, AARON FINKEL, is in fact, a Democrat (see affidavit of Alexandria Lefever).

That the Public Defender, PETER BRANTI, upon assuming office and prior thereto, reviewed the qualifications of the applicants for the positions of Assistant Public Defender and made valued judgments thereon.

That Public Defender, PETER BRANTI, was a former Chief Assistant District Attorney of Rockland County prior to assuming his duties as Public Defender and as such, was in a position during the past few years of being able to make valued judgments on the qualifications of various Assistant Public Defenders during that time.

That aside from the qualifications of plaintiff, ALAN TABAKMAN, or lack thereof, an obvious conflict of interest exists by his continuing as Assistant Public Defender. Attached hereto is New York State Bar Association Ethics Opinion No. 232 of 1972 which states that it is a conflict of interest for an Assistant Public Defender and a Town Justice to be law partners.

That on November 8, 1977, William Wray was elected Town Justice of the Town of Clarkstown, County of Rockland. Mr. Wray is the law partner of plaintiff, ALAN TABAKMAN. For ALAN TABAKMAN to continue his duties as Assistant Public Defender would give rise to a conflict of interest.

That upon information and belief, at the times these papers were served, ALAN TABAKMAN was and still remains a member of the firm of FREEDMAN, WRAY, WAGNER & TABAKMAN and still

remains a member of the firm today.

That in the ELROD case, the practice of the Sheriff's Department of Cooke County was to dismiss one-half of the Sheriff's Department solely on a political basis.

In Rockland County, as is shown by the plaintiff's papers, the Public Defender's Office historically has been a bi-partisan office.

That in addition to the plaintiffs not being retained as Assistant Public Defenders, other assistants of the previous Public Defender were not reappointed as well. Some of those assistants were Democrats. Therefore, the non-reappointments of certain Assistant Public Defenders were not made on a political basis. Furthermore, certain Public Defenders were reappointed including a person with no political affiliation.

The Public Defender's term expired on December 31, 1977. A new Public Defender was appointed. The new Public Defender has a right to terminate those assistants who serve at his pleasure. No present or former Assistant Public Defender was ever coerced into either joining the Democratic Party of Rockland County, supporting the Democratic Party of Rockland County or requesting sponsorship

by the Democratic Party of Rockland County as was the case in ELROD V. BURNS. There was no loss of first amendment freedom at any time. The Legislature of Rockland County changed its political majority in 1974 to Democratic. That resulted in no political dismissals from the Office of the Public Defender. His assistants were retained and at no time ever threatened with the lost of their jobs for their failure to join another political party.

That the present Public Defender has hired (1) a female attorney of the highest reputation as one of his new assistants; (2) has hired a former Assistant District Attorney; (3) has hired a former Assistant County Attorney as a new Assistant Public Defender; (4) has hired a former District Attorney and (5) has hired a former aid to the Special Prosecutor.

That at no time was the position of Assistant Public Defender to be considered a permanent position. That Plaintiff, FINKEL, has offered in his affidavit, an affidavit dated January 5, 1972 by the former Public Defender, FRANK BARONE, in which he has appointed AARON FINKEL as a senior Assistant Public Defender commencing January 1, 1972.

Since Mr. Finkel started his employment as an Assistant Public Defender almost one year prior, if there was permanency to his position what was the necessity of reappointing Mr. Finkel? The only conclusion that can be drawn is that Mr. Finkel's term was subject to reappointment by a new Public Defender, FRANK BARONE, when he took office on January 1, 1972.

That the temporary restraining order should be lifted and a preliminary injunction should be denied on the basis that if the plaintiffs cannot show deprivation of first amendment rights; that the probability of plaintiff's success on the merits is small since the facts of this case can be distinguished very clearly from ELROD V. BURNS, supra.

WHEREFORE, deponent prays that the temporary restraining order be lifted and that a preliminary injunction be denied.

S/
ILAN SCHOENBERGER

Sworn to before me
this 6th day of
January, 1978.

S/

NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY NEW YORK 12207

COMMITTEE ON PROFESSIONAL ETHICS

Opinion #232 - 2/25/72
(5-72) Topic: Town Justice Partnership with Assistant Public Defender; Conflicts

Digest: The limitations upon the practice of a Town Justice prevent his partner from being Assistant Public Defender

Code*: EC 9-2; 9-6

Canons of Judicial Ethics: 31

QUESTION

May partners hold respectively the offices of town justice and assistant public defender?

OPINION

It would be incongruous to expect a Town Justice to also be an Assistant Public Defender. The position of Public Defender carries with it the duty to represent indigent defendants in criminal cases and may result in the representation of defendants in the Court of the Town Justice or a Court of higher jurisdiction.

Such a criminal practice is prohibited to a Town Justice. N.Y. State 146 (1970); N.Y. State 146 (a) (1970). See also N.Y. State 214 (1971); N.Y. State 228 (1972).

The relations of partners in a law firm are such that neither the firm nor any member or associate thereof may accept any professional employment which any member of the firm cannot properly accept. N.Y. State 203 (1971); EC 9-2; 9-6; Canons of Judicial Ethics 31.

Therefore, partners may not properly hold both the offices of town justice and assistant public defender.

Same Caption AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ROCKLAND) ss.:

PETER BRANTI, being duly sworn, deposes and says:

That I am the Public Defender of Rockland County, appointed to that office on January 3, 1978.

That at the time of my appointment, my designated assistants were sworn by the County Clerk of Rockland County as Assistant Public Defenders.

That subsequent to November 8, 1977, I was approached by the Democratic majority of the 1978 Legislature and was told that I would be appointed as Public Defender. Thereafter, I spoke with the various Democratic and Republican political leaders of Rockland County and was given names of lawyers within Rockland County who made known their availability to the position of Assistant Public Defender.

That at no time was any pressure from any political leader brought upon me not to re-appoint any particular person in the office of the former Public Defender.

That as an Assistant District Attorney

with extensive trial experience for the past four years, I have had the opportunity to be on opposite sides with various members of the former Public Defender's Office and made judgments as to their competency and ability, and it was my feeling that the reappointment of plaintiffs was not necessary to the proper functioning of my office and would not meet the highest standards that I have set for attorneys in my office.

That I had requested that certain former Assistant Public Defenders be retained and I have so appointed William Nelson, Manuel Sanchez and John F. McAlevey to continue as Assistant Public Defenders.

That at no time did I coerce any member of the prior or present Public Defender's Office to support the Democratic Party of Rockland County or to request that they swear allegiance to the Democratic Party of Rockland County and in no way did I make their jobs conditioned on their political beliefs.

That attached hereto is a list of the former Assistant Public Defenders appointed by my predecessor. Next to their names are their political affiliation.

Next to their political affiliation is whether they were reappointed or resigned. As is shown in that list, a number of Democrats were not reappointed and Mr. Sanchez, who is not affiliated politically, was reappointed. Some of the former Assistant Public Defenders who are Republicans had either resigned or retired.

That plaintiff, FINKEL, is listed as a registered Democrat and in no way therefore, can his non-reappointment be considered on the basis of political reasons.

That plaintiff, TABAKMAN, is a registered Republican. However, as of the date of these papers, his continued membership in the firm of FREEDMAN, WRAY, WAGNER & TABAKMAN would constitute a conflict of interest since his law partner, William Wray, took office on January 3, 1978, as Clarkstown Town Justice. This would create an appearance of impropriety in the Public Defender's Office and does not measure up to the high standards which I intend to maintain in my office.

That at no time since November 8, 1977, did Mr. Tabakman take any action that would

prevent a conflict of interest from arising, to my knowledge.

That this conflict of interest was considered by me in deciding whether to reappoint Mr. Tabakman and is proper cause for Mr. Tabakman's non-reappointment.

WHEREFORE, deponent prays that the temporary restraining order be lifted; that a preliminary injunction be denied inasmuch as defendants have adequately shown that the plaintiff's non reappointment resulted from other than political reasons.

S/
PETER BRANTI

Sworn to before me
this 6 day of
January, 1978.

S/

PUBLIC DEFENDER'S OFFICE
FORMER STAFF

Fitzgerald, James A	N.R.	D.
McAlevey, John F.	R.	D.
Nelson, William K.	R.	D.
Sanchez, Manuel	R.	N.Reg.
Selman, Barnet S.	Ret.	R.
Leudan, Stuart M.	Res.	D.
Wray, William F. Jr.	Res.	R.
Finkel, Aaron	N.R.	D.
Tabakman, Alan	N.R.	R.

N.R. denotes Not reappointed
R. denotes Reappointed
Ret. denotes Retired
Res. denotes Resigned
D. denotes Democrat
R. denotes Republican
N.Reg. denotes Not registered

Same Caption AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ROCKLAND) ss.:

JAMES K. ANDERSON, being duly sworn, deposes and says:

I am the Personnel Officer of the County of Rockland and make this affidavit in opposition to plaintiff's application for a preliminary injunction.

That I have reviewed the Personnel records of ALAN TABAKMAN and AARON FINKEL and have attached copies of their Personnel record. ALAN TABAKMAN'S and AARON FINKEL'S positions were in an exempt class. Appointees to such positions are not reviewed for qualifications. The appointing officer has sole discretion in the appointment and removal of individuals in this class of position under the Civil Service Law of the State of New York. In this case, the appointing officer is the Public Defender. Historically, an Assistant Public Defender serves at the pleasure of the Public Defender and no permanent status had ever attached to either of these plaintiffs. Although an appointment may be processed for technical reasons as permanent, this classi-

fication does not restrict the appointing officer in any way.

S/
JAMES K. ANDERSON

Sworn to before me
this 6th day of
January, 1978.

S/

Same Caption AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ROCKLAND) ss.:

ARTHUR ACKERSON and ALEXANDRIA LEFEVER, being duly sworn, depose and say:

That we are the Elections Commissioners of Rockland County. That upon the request of the County Attorney, we have reviewed the most up-to-date voter registration lists available in our office.

That attached hereto is a list of the voter registrations of the former Assistant Public Defenders and the newly appointed Assistant Public Defenders as well as copies of the applicable voter registration lists.

S/
ARTHUR ACKERSON

S/
ALEXANDRIA LEFEVER

Sworn to before me this
6th day of January, 1978.

S/

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The following is a reprinting of the relevant portions of the trial transcript of the United States District Court, Southern District of New York. Please note that pages 46 through 179 of this appendix contain the relevant portions of the transcript of the hearing on the preliminary injunction. Pages 180 through 390 of the appendix contain the relevant portions of the transcript of the plenary trial, which was combined with the hearing on the preliminary injunction.

An asterisk (*) indicates omission of testimony which extends onto a page not reprinted in the appendix.

as follows: [3]

DIRECT EXAMINATION

BY MR. FINKEL:

MR. FINKEL: Your Honor, at this time, if I may, I would like to make an application to exclude some witnesses.

THE COURT: Very well.

MR. SCHOENBERGER: Mr. Branti, who will testify, is also a defendant in this matter.

THE COURT: He may stay.

BY MR. FINKEL:

Q Mr. Barone, until recently, have you held any public office?

A I was the public defender of Rockland County by appointment from January 1, 1972 through and including December 31, 1977.

Q By what party was the legislature controlled when you were appointed?

A The majority of the legislators at the time of my appointment were Republican.

Q What was the political persuasion of your predecessor, if you know?

A He was Arnold Becker, my predecessor, and he was a Democrat.

* [5]

Q That is correct.

A Can you be of some further assistance by refreshing my recollection?

Q Was William Nelson appointed by you?

A Yes. He was appointed by me. He is a Democrat.

Q James Fitzgerald?

A He was appointed by me and he is also a Democrat.

Alan Tabakman was appointed by me and he is a Republican.

Q I was a Republican at the time that you continued to be in office?

A As I recall, yes.

Q I had served to your knowledge under Mr. Becker who was a Democrat?

A Mr. Becker had appointed you originally, yes.

Q Was it your understanding that Mr. Tabakman and I were permanent or provisional or what kind of employees were we?

MR. SCHOENBERGER: Objection, your Honor.

THE COURT: Overruled. [6]

A My understanding, my own personal understanding, was that everyone was appointed by me permanently, but at my pleasure, could be removed.

Q For no reason at all or for cause; would you need cause?

A I would not need cause.

Q You thought that you would not need cause?

A I felt that I would not need cause.

Q But the appointments were permanent?

A The appointments were permanent.

Q Did there come a time when you discussed the appointments to be made under the public defender who was to succeed you, with your succeeding public defender, that is Mr. Branti?

A Yes, Mr. Branti and I had perhaps two conversations that I might recall about the appointment of the new assistant public defenders.

Q Did you discuss with Mr. Branti how the public defender, assistant public defenders were to be chosen and on what basis they were to be chose, and who was to be appointed?

A It was my understanding that the majority of the new legislators, eleven, were going to hold a series of caucuses and prepare a list of attorneys submitted by them [7]

from which would be chosen the assistant public defenders and the assistant county attorneys.

I suggested to Mr. Branti certain assistants and he suggested that it would have to come from the legislators.

Q Was there any discussion as to how many and who would be the public defenders from each of the townships and how they would be chosen in each of the townships?

A No, we had no such discussion. If he knew he didn't tell me, I will put it that way?

Q Were you satisfied with my employment during my employment with you over the six years that you served?

A Yes, completely so. I think I wrote you a letter to that effect.

Q That is correct.

Did you find me to be competent?

A Yes. I would reemploy you again.

You will recall, Mr. Finkel, that you were the first public defender in the County of Rockland to win a drug case. I won't forget it.

Q How would you characterize Mr. Tabakman's performance over the period of time that he served with you? [8]

A I think Mr. Tabakman is an extremely competent attorney and I can't say more than that. I have been happy with him.

Q Would you have continued my employment had you remained as public defender?

A Yes.

MR. SCHOENBERGER: Objection.

THE COURT: Overruled.

A Yes, I would have.

Q Would you have continued Mr. Tabakman's employment if you--

MR. SCHOENBERGER: Same objection, your Honor.

THE COURT: Overruled.

A Yes, I would have.

Q In the regular course of business did you keep a personnel file for your own records, copies of which went into a permanent personnel file?

A Yes.

Q I show you certain documents -- I will show you first a report of personnel change dated March 26, 1971, signed by or apparently the original of which was signed by Mr. Becker.

*

* [22]

MR. FINKEL: Your Honor, I would appreciate it if the Court would make a note to the extent that Mr. Tabakman's oath is a part of the answering papers.

THE COURT: You are referring to this oath that is dated September 5, 1975?

MR. FINKEL: Yes, your Honor.

MR. SCHOENBERGER: There is no oath on there for Mr. Tabakman. It appears to have Mr. Barone's name on there.

THE WITNESS: No.

THE COURT: I have a note here signed by Mr. Tabakman, to be sworn to before Mr. Barone.

MR. SCHOENBERGER: I am sorry, your Honor.

THE WITNESS: That's right.

BY MR. FINKEL:

Q Mr. Barone, I show you another doucment annexed to the answering papers of the defendants.

It is marked "Report of Personnel Change" dated September 5, 1975, and having to do with the appointment of Alan Tabakman.

A Yes.

Q When you filed that report of personnel change--did you file that report of personnel change? [23]

A Yes, my office did.

Q When you filed it, did you likewise, or were you likewise unaware of the fact that it called for a temporary or a period type of appointment?

A This document that you are showing me, which is a photostatic copy of an appointment of Mr. Tabakman, indicates a term of office until 12/31/77.

As I have told you before, and as I will tell you now under oath, it was never my intention to limit that. I left this to Ms. DiCarlo to prepare. As a matter of fact, the X mark where it says "Temporary" and the X mark where it says "Exempt" are not done by my office at all since they are apparently done in ink.

I never paid that much attention to it. I left it to Ms. DiCarlo to prepare this in total and merely signed it.

I developed a policy in later years, as pointed out by one of your exhibits, of signing the duplicate copy and keeping it in the personnel file rather than having it a conformed copy.

Q Thank you.

THE COURT: How about the words "Part Time"?

THE WITNESS: That is-- nothing is done. Nothing is marked there except that all assistant public defenders, your Honor, [24] are part time.

THE COURT: All right.

THE WITNESS: They were at this time anyway.

THE COURT: It means that he can practice law?

THE WITNESS: Yes. Actually part-time as used in the County of Rockland must be differentiated from exclusivity. That means they can't practice law. Many of them put in 30 or 40 hours a week on a part-time basis.

Q Mr. Barone, would you have continued the employment of Mr. Tabakman irrespective of whether or not his partner may have become a judge if it were legally permissible or if some kind of conflict could be removed?

MR. SCHOENBERGER: Objection, your Honor.

I object to the form of the question.

THE COURT: I think I will sustain that objection.

Q Would you have continued Mr. Tabakman in office had you continued in office.

A Yes.

MR. SCHOENBERGER: Objection again, your Honor.

THE COURT: I will overrule the objection.

Q Did you consider him to be a permanent?

A Yes.

Q Mr. Barone, who was the administra- [26]
tor or administrators, who were the administrators of your office.

A Just myself.

Q Did you always call yourself the Dictator?

A I frequently told you, Mr. Finkel, and everyone who worked for me that you live in a democracy but you work in a dictatorship.

Q Did you review every piece of paper that left that office prepared by either myself or Mr. Tabakman?

A No assistant ever prepared a letter in my office that was not first reviewed by me before it went out.

Q Did I enjoy any confidential relationship other than as, as attorney-client, was there any peculiar confidential relationship that I enjoyed or Mr. Tabakman enjoyed in that office?

A With myself?

Q With yourself or in the office as a whole?

A No. You had nothing to do with the administration. And the only confidentiality that you and I enjoyed mutually was the confidentiality of the client-attorney relationship.

Q Did Mr. Tabakman or I have the auhtority to determine which clients were eligible for representation by the office? [27]

A No. The guidelines for representation by the public defender in Rockland County are set by the legislature, the are, however, only guidelines. The public defender has the final right of determination as to who shall be represented, absent an order from a judge, and each time a judge requested that we defend someone who was indigent, I would ask the judge to put on the record that he examined into the indigence.

Q As an assistant public defender I was not a policy-making employee?

A No. You were given a file.

Q Was I a confidential employee?

A No.

Q As a senior assistant public defender was I a confidential employee or a policy-making employee?

A You were not.

Q Did I administer the affairs of the office in any way?

A No. You were a supervisor of the justice courts.

Q Thank you.

Was Alan, Mr. Tabakman --

A I beg your pardon?

Q Did Mr. Tabakman have any peculiar policy-making functions? [28]

A No.

Q Was he an administrator?

A No.

MR. FINKEL: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. SCHOENBERGER:

Q What are the duties of your assistant public defenders?

A The assistant public defender is assigned duties in connection with the defense of indigent persons accused of crime, in justice courts, county courts, or wherever in the County of Rockland.

There are 23 justice courts and at the present time 3 county courts.

Q Can you tell me in detail what the responsibilities are?

A Well, I think that you could best get that from a job description which is on file with personnel, but a description of their duties are --

Q I asked you their responsibilities.

A Their responsibilities, all right.

They have the responsibility to make appearances in court and to competently defend the clients assigned to them. [29]

Q When one of your assistant public defenders appeared in court and a matter required some determination on his part, a legal determination or a strategical determination, how to handle a case, did he have full authority and power to make that?

A Only if the decision had to be made at the moment in the courtroom.

Q But were he in a courtroom and were a situation to arise, perhaps the plea of a defendant, he had the authority to use his judgment and determination as to what the plea should be if he could get one that would be acceptable?

A If the circumstances dictated that the plea had to be taken at that moment; but if it didn't, he had to come back to the office.

I will give you an example, if you will, and perhaps save you a lot of questions.

If a case came on and the question was, shall we make a motion or not; in other words, to put the defendant on the stand, it would be my decision after discussion with the assistant about the pertinent facts and details concerning the defendant, his rap sheet, if you will, and what have you. [30]

That decision had to be made in the office.

If he had to take a plea in court, as of that moment, it was usually done on the spot, if the circumstances dictated, but only in the justice courts, not in the county courts, not on felony matters.

Q Did Mr. Tabakman or Mr. Finkel represent the public defender's office in the county courts as well as the justice courts?

A Yes. Mr. Tabakman far less than Mr. Finkel, but Mr. Finkel has many times represented the public defender's office in the county court. They both represented our clients for the most part in the justice courts on misdemeanors and traffic offenses.

Q If they were before a judge in the county court and they had Mr. Finkel, for instance, he would have full latitude and discretion on how to handle that case and what to do with it?

A To a limited extent, as any lawyer would. My policy was never to destroy the professional attitude that I believe a lawyer should maintain in defending a client. I would not wish to in any way psychologically demean him so that he had to call me for every minor decision that had to be made. But he didn't have the latitude that you suggest. [31]

Most of my assistants knew just how far they could go.

Q But they all had a limit to which they could go?

A Yes. As any lawyer should.

Q They all had some determination as to how to handle a case?

A Yes.

Q And the policies to set on each case?

A You would have to tell me what you mean by policies.

Q I will certainly not debate with you.

A I don't know what you mean by policy. If you will tell me what you mean by it, I will be happy to answer it.

Do you mean what plea to accept?

Q With an individual case.

A Yes.

THE COURT: I think what I had better suggest to you is that I don't see policy and confidentiality the way you apparently see it, Mr. Schoenberger.

I think this has to do with a person's function in government, and not with their relationships to a client, not with their performance of assigned tasks such [32] as defending a client and making policies on an individual case or accepting confidencies

from a client; I do not regard that as the confidentiality and the policy-making that is spoken of in the cases.

Q In the years that Mr. Finkel and/or Mr. Tabakman were with you, did there come a time when they had your confidence?

MR. WAGNER: Objection, your Honor.

I don't think that "confidence" is used as it is meant in the statute.

THE COURT: Just a second. Mr. Finkel is the attorney on this.

MR. WAGNER: I am sorry.

MR. FINKEL: Your Honor, I don't intend to object to this line of questioning, in the interest of expediency, and I would like to get this hearing concluded.

I am going to give Mr. Barone the fullest latitude in answering the questions.

A Mr. Schoenberger, would you please explain to me what you mean by "confidentiality"? I will be happy to answer the question.

Q You are a lawyer, Mr. Barone. You are familiar with the word "confidentiality." You know what the word "confidentiality" [33] means.

Did Mr. Tabakman or Mr. Finkel, during the course of their employment by you, have your confidence and confidentiality?

A In making policy? In what way? In discussing whether we should ask for another girl from the legislature or whether the work in the office was getting too great or voluminous?

Q If there was a confidential matter concerning a case.

A Concerning a case?

Q And you wished to discuss it with them, did you feel that you could confidentially discuss it with them?

A The case they were handling?

Q Any cases in the office.

A Any cases in the office I could discuss with them, absolutely.

Q You felt that there was a confidential relationship between you and them as your employees?

A In connection with clients, absolutely. I said that before to Mr. Finkel.

[36]

Q Did you discuss with him the possibility of keeping you on in the office of public defender?

A I certainly did.

Q Do you recall what he said to you at that time concerning that?

A Yes. He was aware, as I was, that at about a year and a half ago I had an opening for an assistant public defender and the only applicants I had were Democrats. I called Mrs. Cornell, the chairman of the Democratic Party in RocklandCounty, and I suggested to her that I would be most appreciative if she could recommend several names to me, and if acceptable, I would be happy to appoint one. And that I would then expect some consideration so that at the end of my term of office in December of 1977, I would receive an appointment somewhere in the county hopefully as an assistant public defender so as to achieve a retirement for which I have approximately four to five months left.

When Mr. Branti came to my office, I asked him if it was his intention to re-appoint me as an assistant and I offered at that time to do all of his appeal work which I had been doing for six years. [37]

Q Once again, do you recall what his response to you was at that time?

A Yes. He said he couldn't do it.

Q Mr. Barone, are you resentful at all to Mr. Branti for having not appointed you?

A No. Mr. Branti and I have been friends for a number of years and I am not resentful of Mr. Branti at all. As a matter of fact, as Mr. Branti will tell you, I hope, we have been most cooperative since he took office before and during the strike that's going on right at the present moment.

Q Mr. Barone, how many of the public defenders or assistant public defenders or other attorneys in your office were either partners or associated with the firm of Freedman, Wray, Wagner & Tabakman?

MR. FINKEL: Objection, your Honor.

THE COURT: What is the basis of the objection?

MR. FINKEL: It is immaterial and it has no probative value, your Honor.

MR. SCHOENBERGER: Your Honor, it is very material.

THE COURT: I don't know whether it is or not. But I will listen to it. I will overrule the objection. [38]

A Fine.

In answer to your question, in my office, not appointed at the same time, but in my office at, on the date that I terminated December 31, 1977, I had Mr. Tabakman and Mr. Wray, who are partners, and Mr. Sanchez, who was associated with the firm. He is not a partner, to the best of my knowledge.

Q To the best of your knowledge, on this day, are Mr. Tabakman or Mr. Wray still partners?

A To the best of my knowledge today they are still partners.

Q Do you have any idea, approximately, an approximate idea, if possible, how much the partners or the associates of the firm of Freedman, Wray, Wagner & Tabakman receive in salaries from the county, while under your employ in the public defender's

office?

MR. FINKEL: Objection, your Honor.

THE COURT: That is a matter of arithmetic, either addition or multiplication. I don't see the relevancy of this.

If there are three of them who are partners, then it is a matter of adding up their three salaries.

MR. SCHOENBERGER: I was wondering if he could give us an approximate figure. [39]

I will tell you what I am leading to, your Honor. I think there is a much closer association here besides public defender and assistants.

I think that goes to the direct credibility of Mr. Barone's testimony.

THE COURT: I will overrule it.

A What you would have to tell me was the date of appointment of each.

Q I am asking you if you know.

A No. It is $13,000.

Q Would you be surprised to learn that between Mr. Wray, Mr. Tabakman, Mr. Finkel, and Mr. --

MR. FINKEL: Ojbection, your Honor. I am not a partner of that firm.

MR. SCHOENBERGER: Excuse me.

Between Mr. Wray, Mr. Tabakman and Mr. Schanez, that during your tenure of public defender, those gentlemen received over $100,000 from the County of Rockland?

A I would say that is approximately correct.

Q Mr. Barone, did you have any expectation of becoming a member of that firm after you left the public defender's office?

A No.

Q Never at any time, sir? [40]

A No. I had an expectation of getting space there if it were available. It has been made available and I have not accepted it. There was never any question of becoming a member of that firm.

Q Barry Weiss, is he a member of the public defender's office?

A No. Barry Weiss was a law student under appellate division order in his last year and after that and subsequent to that he was a volunteer in the office.

Q Where does he work?

A He works for Freedman, Wray, Tabakman & Wagner; recently, that is, in

the last few months.

Q Did he at any time cover calendar for Freedman, Wray, Tabakman & Wagner?

A Yes. And others.

Q As public defenders?

A And others, yes.

Q Did he cover calendars for your office also?

A Yes. I am authorized by law to employ outside counsel.

Q Did he ever take an oath of office?

A He doesn't have to. He doesn't get paid.

Q Your answer is no?

A No. He didn't take an oath of office. [41]

Q Did you ever as a highly professional public defender and attorney feel that this association may border on impropriety or even be in the realm of impropriety?

MR. FINKEL Objection, your Honor.

THE COURT: What relationship?

MR. SCHOENBERGER: The relationship between the public defender's office and Freeman, Wagner, Tabakman & Wray.

A I don't understand the question.

THE COURT: Just a second. there is a pending objection. I will overrule the objection. Do you think that it was improper?

THE WITNESS: No, I didn't.

Q Would you think it was improper if Mr. Tabakman remained in the office of public defender when his partner Mr. Wray became a Clarkstown Justice?

Q As I said before, and the point was not pressed, I would have reappointed Mr. Tabakman even though his partner Mr. Wray was appointed town justice because it is my recollection there there is an opinion of the Attorney General, and also an opinion of Audit and Control which I read, which indicates that a town justice who is part time may not practice in any other justice court, but that any person who is partner or associate in the firm may practice criminal law in any other justice court excepting his. [42]

That is my recollection and that would have been the basis of the reappointment.

I don't have the numbers of the --

Q You don't feel, sir, do you, that a municipal employee, an assistant public defender, might be acting improperly if he were to appear in the justice court where his own partner was sitting as a judge?

A He could not appear there. I just pointed it out. The opinion of the Attorney General points out that he could not appear in the justice court in which his partner was sitting, whether his partner was sitting as the judge or whether there was another judge there. He could not appear in that court.

Q I show you a copy of the Opinion Committee on Professional Ethics for the New York State Bar Association, dated February 25, 1972.

Have you ever seen this opinion before?

A No, the opinions I saw were --

Q Would you read the opinion?

A -- of the Attorney General and the Department of Audit and Control, if I remember correctly.

This opinion, do you wish me to read it?

Q Yes.

A The opinion --

MR. FINKEL: Objection.

Your Honor, I think the opinion is part of the papers submitted to the Court. In order that we complete this hearing, perhaps if it can be done today, I don't think it is necessary.

MR. SCHOENBERGER: Your Honor, I would like Mr. Barone to read the opinion.

THE COURT: He can read it to himself.

A This opinion has absolutely no bearing on what we were talking about.

Now, if you would like, I will read it.

Q Have you read it, sir?

A Yes, I have.

It has no bearing on what we are talking about.

Q Even with the knowledge of this opinion you would then still appoint Mr. Tabakman were you able to as an assistant public defender?

A Absolutely.

Q Thank you very much.

MR. SCHOENBERGER: No further questions, your Honor. [44]

MR. FINKEL: I have a few

THE COURT: What do you mean that this opinion has no bearing?

THE WITNESS: May I just have that opinion again?

I have never seen it before. I read it rather quickly. I will point out to the Court why it has no bearing.

The question is, may partners hold respectively the offices of town justice and assistant public defender?

Opinion: It would be incongruous to expect a town justice to also be an assistant public defender.

I absolutely agree with that and would not have appointed Mr. Wray.

The position of public defender carries with it the duty to represent indigent defendants in criminal cases and may result in the representation of defendants in the court of the town justice or a court of higher jurisdiction. Such a criminal practice is prohibited to a town justice. The relations

of partners in a law firm are such that neither the firm nor any member or associate thereof may accept any professional employment which any member of the firm cannot properly accept. [45]

Now, I don't think that applies. I think that the application is to the town justice alone.

He can't --

BY MR. SCHOENBERGER:

Q Did you read the digest in the upper right-hand corner?

Would you read it out loud?

A "Town justice partnership. The limitation upon the practice of a town justice prevents his partner from being an assistant public defender."

This is on the stationery of the New York State Bar Association, the Committee on Professional Ethics.

May I ask you what standing that has?

Q I am not on the witness stand, sir.

THE COURT: When you say it has no bearing, do you mean that you disagree with it?

THE WITNESS: Yes, sir. It has

no bearing based on the opinions I have seen from the Attorney General which I think takes precedence over the New York State Bar Association opinion.

I hasten to add that those opinions may have been superseded, but I am not aware of them. I do get most of the literature. [46]

BY MR. SCHOENBERGER:

Q Mr. Barone, this opinion was rendered on February 25, 1972.

You were a public defender at that time, weren't you?

A I am talking about the opinions of the Attorney General, Mr. Schoenberger.

Q You don't follow the Opinions on Ethics, is that the idea?

MR. FINKEL: Objection, your Honor.

THE COURT: Objection sustained.

MR. SCHOENBERGER: No further questions.

MR. FINKEL: I have a few questions.

REDIRECT EXAMINATION

BY MR. FINKEL:

Q When you appointed Manny Sanchez as an assistant public defender, was he a member of the firm ofFreedman, Wray, Wagner & Tabakman?

A He was not.

Q Do you know of any financial or economic relationship between them or even if they knew each other at the time you took Manny Sanchez into your office?

*

[52]

*

Q You were appointed by the then public defender Arnold Becker?

A Yes.

Q What was his political party?

A Arnold Becker, to the best of my knowledge, was a Democrat, appointed by a Democratic-controlled legislature, or Board of Supervisors.

Q What was your enrollment at the time of your appointment?

A I was put on as a permanent employee.

Q What was your political enrollment at that time?

A I was a Republican. I had been a Republican for at least ten years at that time.

Q At the time of your initial appointment, did you have any understanding as to whether this was a temporary or a permanent appointment?

A There was no question in my mind that I was a permanent appointment. I wouldn't have taken the job for the tenure

of Mr. Becker, which was just a few months.

Q You were appointed in 1971. Mr. Becker's appointment ran out when? [53]

A December 31, 1971.

Q Right.

Now, Mr. Finkel, subsequent thereto Mr. Barone, who just testified, became the public defender, is that correct?

A Yes.

Q Did you approach Mr. Barone about being retained in your position?

A No. He just continued me in office.

Q Was there any discussion between you and Mr. Barone as to whether you would stay or whether you would go?

A He asked me, I believe -- it is a long time ago -- I believe he asked me if I would supervise some of the other assistant public defenders. I did. I stayed on.

Q At that time was it your belief that your continuation by Mr. Barone was on a permanent basis?

A It certainly was.

Q Did there come a time some time in the latter part of the year 1977 when you became aware as to the possibility that an attmept would be made to terminate you from your job?

A Towards the end of the year 1977, yes. I read it in a newspaper. [54]

Q Prior to reading it in the newspaper, was there anything which led you to believe that Mr. Barone was going to be replaced by another public defender?

A Yes. There was much talk about that. The new legislature was going to appoint a Democrat and then there was discussion as to who itwould be. It was pretty much understood that Mr. Barone would not be reappointed by the Democratic legislature.

Q Mr. Barone was a Republican appointed by a Republican-controlled legislature in 1972, it that correct?

A Yes.

Q There was an election held in Rockland County as it is held every four years for the County legislature, is that

correct?

A Yes.

Q Which party won the election?

A In the most recent election, the Democrats controlled the legislature.

Q As the result of your feeling that a new public defender would be appointed, did you have occasion to have any conversation with the defendant herein, Peter Branti, concerning whether he would become the public defender and if so [55] whether he would retain you in that position?

A Yes, I did.

Q Could you tell us approximately when you had that discussion and the gist thereof?

A In fact I had two discussions. I had one, I think it was in November in the office of the District Attorney. I approached Mr. Branti and I indicated in some way that I would like to remain on with the public

defender's office.

He didn't commit himself, he didn't say anything at that time. At that time I don't think he knew that he had, he was going to get the appointment. I was between him and Jack McAlevey.

He didn't commit himself because I don't think he knew.

Q Did you have a subsequent conversation with Mr. Branti concerning your being retained in that position?

A Yes. I met Pete Branti at the back of the courthouse, by chance, and I asked him, I told him that I had two kids in college and I needed the job, and I would like to remain on because I understood that there was talk that the legislators were going to make the appointments. [56]

Nobody had approached me or said anything to me.

Pete said it is not up to him so --

Q This conversation, did the conversation, to the best of your knowledge, take place prior to December 24, 1977, when there was an article in the newspaper?

A Yes.

Q Subsequent to your conversation with Mr. Branti wherein you indicated your intention to remain with the public defender's, if possible, did there appear an article which you read in the local newspaper, the Rockland County Journal-News?

A Yes. I am looking at a copy of that article now.

Q Is the Rockland County Journal-News a daily publication published in and around the County of Rockland?

A Yes.

Q Did you yourself obtain a photostat copy of the article from that newspaper?

A Yes, I have the original in my papers if you would like that.

MR. WAGNER: I would like to offer that in evidence, your Honor.

MR. SCHOENBERGER: I have no objection to it being admitted into evidence, [57] your Honor, only as a copy of a newspaper article, but not as to any truth pertaining to the article.

THE COURT: All right. It will be received.

(Plaintiff's Exhibit 7 received in evidence)

Q Mr. Finkel, subsequent to reading that article --

A Shall I find it for you?

Q That's all right.

Mr. Finkel, could you tell us essentially what the gist of that, the purport of that article is?

MR. SCHOENBERGER: Objection, your Honor. There is no indication that the article reports the truth or any semblance of the truth. I have no objection to the fact that it appeared in the newspaper. I will accept that as being true.

MR. WAGNER: I offered it to lay a ground for the plaintiff's subsequent actions which he took based upon what he read in the public press.

THE COURT: I just read the article. I take it that you read the article?

THE WITNESS: Yes.

THE COURT: We will go on.

Q Subsequent to that appearance of the article, did you in concert with Mr. Tabakman, the coplaintiff herein, prepare and serve upon the defendant Peter Branti a certain letter? [58]

A Yes.

Q Was that letter in fact served on Mr. Branti on December 30, 1977?

A Yes, it was.

Q I believe counsel for the defendants has a copy of this letter.

MR. WAGNER: It acknowledges receipt by the County Attorney and Mr. Branti. I would offer that in evidence.

MR. SCHOENBERGER: I will object to the admission of that letter in evidence, your Honor because (1) it is completely self-serving; (2) one needs only to look at the letter to determine that it was prepared for the purposes of this litigation.

MR. WAGNER: I will so concede.

I offer it, your Honor, solely for the purpose of showing that defendant Branti was put on notice of the fact that Mr. Finkel and Mr. Tabakman intend to continue their employment with the public defender's

office and were ready, willing and able to do so.

THE COURT: it will be received. [59]

MR. WAGNER: I offer it as Plaintiff's Exhibit 8, your Honor.

(Plaintiff's Exhibit 8 received in evidence)

Q Mr. Finkel, can you tell us --

MR. SCHOENBERGER: If your Honor please, I will object for the record. I think that if Mr. Finkel is going to write notes to Mr. Tabakman during the course -- I am sorry, Mr. Finkel is going to write notes to Mr. Wagner during the course of the trial, in order to aid him, presumably to help him testify, to ask him questions, I will object to that very seriously.

MR. WAGNER: I have no objection to the objection, your Honor.

THE WITNESS: I made a note for myself. Mr. Wagner thought perhaps that I was making a note for him. I was only making a notice for myself.

MR. WAGNER: Also, I couldn't even read his note.

THE COURT: Let's go on.

Q Mr. Finkel, in your duties as an assistant public defender, and I am talking about your duties as of the end of December, 1977, what did those duties consist of?

A I went to-- I handled all justice courts matters as directed by the public [60] defender.

Q When you say "handled," what exactly was it, your position vis-a-vis the defendants who appeared in these courts; what did you do?

A I would come into the office each Monday morning or Monday afternoon, obtain my files, review my files either at the office or elsewhere, appear Monday nights in the Town of Stony Point to represent those defendants whose files I had -- they were declared eligible by Mr. Barone prior to that time.

Q Did you have anything to do with declaring someone eligible by you as an assistant public defender?

A No. As a matter of fact if I went to court and a prospective client needed assistance, I always, at the direction of Mr. Barone, asked the Court to please grant

an adjournment to either the next Monday night or to two weeks hence so the defendant could appear at my office and be interviewed by an investigator or an attorney and be declared eligible by Mr. Barone for representation.

Q Did you have any say or voice or any relationship whatsoever with the running of the public defender's office.

A. Not in any way whatsoever. As a matter of fact, Mr. Barone was always adamant that any piece of paper that went [61] out of that office be reviewed by him for its legal sufficiency and technical sufficiency.

Q Did Mr. Barone, did you and Mr. Barone have any position of confidentiality, one with the other, wherein he would take you into his confidence concerning any matters other than cases in which you were appearing?

A Perhaps in an unusual circumstance we shared a confidence. He would say, "Look, don't tell anybody." The same thing that, among any employer and employee.

Q Did you share the same confidences with your coemployees?

A Yes.

Q And with other members of the bar who were not related to you in any way, friends of yours?

A On occasion if it didn't violate a defendant's relationship with me.

Q Mr. Finkel, in the course of your employment as deputy public defender, or assistant public defender under both Arnold Becker and Frank Barone, were you ever reprimanded by either one?

A No, never. Mr. Barone sounds off once in a while.

Q A formal reprimand?

A No. In no way. As a matter of fact, I asked Mr. Barone if he had anything [62] that might be helpful to me in this action. He said, "Well, I have some letters from various churches and things which I have received commending you for certain work that you have done." I didn't bring it out in his testimony, but I am sure if he is recalled --

Q To your knowledge, there has never been any question raised by anyone in the two terms, the two public defenders under

which you served concerning your competence or ability?

A No. In fact, Mr. Becker made a party after I won a very substantial case. Mr. Barone has commended me often.

Q Mr. Finkel, what political party are you registered in as of today?

A I really don't know. Back in February or so I had a conversation--I have been a Republican for the past seventeen years. In February or so of this year I had a conversation with the District Attorney who, of Rockland County, who indicated to me that--he offered me a job in his office. I told him that I wanted to stay on with the public defender's office. He told me that it would be a good idea if I changed my enrollment.

I went to the office of the Commissioner of Elections and I changed my [63] enrollment.

Q When was that change effective?

A It was effective after the 1st of this year. I didn't want to seem as though I was doing it for political reasons.

Q In other words, as of at least the

end of December, 1977, you were still a Republican, registered as such?

A Yes.

Q Mr. Finkel, do you have any opinion as to the reason why you were not reappointed?

A There is absolutely no question in my mind that I was not reappointed because I was a Republican.

MR. SCHOENBERGER: Objection. That is a proper determination for the Court.

THE COURT: Overruled.

MR. WAGNER: I have no further questions, your Honor.

THE WITNESS: Your Honor, may I just say one thing? I am not certain that it was, that the District Attorney, when he spoke to me, used the exact words I used. But he did say that it would be a good idea to change my enrollment or something of that nature, and I did do it.

CROSS-EXAMINATION [64]

BY MR. SCHOENBERGER:

Q Is it correct that in about February of 1977 you filed papers with the

Board of Elections to become a Democrat?

A Yes.

Q Copies of those forms are attached to the papers that we submitted here?

A What was that?

Q Have you seen copies of those forms attached to the papers submitted?

A I went over your papers in five minutes. If you have the form I signed, I will acknowledge that it is accurate. I did sign a form to become an enrolled Democrat.

Q Is this the form?

A That is a form bearing the date February 16, 1977, signed by me; the signature and the date are very obvious to me in my handwriting from the photocopy, that is. The other printed material, I don't think I wrote. I don't think I wrote anything else on that form but I did write the date and I did sign it, and I did make that application.

Q Did anyone ever force you to become a Democrat? [65]

A No.

Q You did so voluntarily?

A Yes.

Q Did anyone ever force you to give

money to the Democratic Party?

A No, but I have.

Q when were you first appointed as an assistant public defender?

A I was first appointed in March of 1971.

Q When you were appointed, was that March of 1971?

A I think it was the 26th of March or the 29th of March.

Q Approximately.

A This is my recollection from papers I have reviewed. It was not -- it was the first part of 1971, I will say.

Q Wasn't the existing legislature due to terminate in December 1972?

A That is right.

When you were appointed by Mr. Becker, in March 1971, are you aware if there were any promises or representations made or any political deals to carry you into the new legislature and into a new appointment, or a further appointment as a public defender? [66]

A No. I am not a very strong person politically. I was a committeeman at one time, but of minor stature.

Q The second time you spoke to Pete Branti, had he then been appointed as public defender?

A The second time, no.

Q You asked Mr. Branti if in the event he became public defender, if you could remain in the office, is that correct?

A My recollection is, it was a brief meeting, I recall; I recall almost precisely what I said. I said, "Pete, I have two kids in college. I need the job." And I don't know if I said I understand you are going to terminate me. But it was understood that I was not going to be there. Nobody spoke to me. Everybody avoided the situation. Everybody knew that we were all going.

So -- what was the question? I am getting emotional.

Q You knew "we were all going." Go ahead and finish.

A What was the question?

Q You classified yourself as being permanent?

A Yes.

Q You testified that you had a belief that you were permanent? [67]

A Yes.

Q You heard Mr. Barone testify--

A Yes.

Q --as to what permanent meant to him?

A Yes.

Q Did you have the same understanding as to what permanent meant to you also?

A Until recently, yes.

Q You knew you were serving at the pleasure of the public defender, didn't you, when you were first appointed?

A I felt if I did my job--

Q Would you answer my question, please? You were serving at the pleasure of the public defender when you were first appointed, weren't you?

A Yes, provided I did my job, provided I didn't mess up. I assumed that I was --

Q You knew when you took that job in March 1971, it was at his pleasure?

A You are putting words in my mouth and you know that. We can be adult about this. We are both attorneys.

MR. SCHOENBERGER: Your Honor -- [68]

THE COURT: The question is, did you know in 1971 when you took the appointment as an assistant public defender that you would hold that job at the pleasure of the public defender?

THE WITNESS: At that time I felt that I served at the pleasure of the public defender, yes.

THE COURT: Next question.

Q Do you recall previously testifying in court that you would not have taken the job in March, 1971, if you had not believed it to be permanent?

A Yes. I left a job to take that job.

Q At the pleasure of the public defender?

A Yes.

Q Were you aware when you took the job that the public defender, whoever that may be, could dismiss you without cause if he chose to do so?

A At that time I believed that to be true. But I generally do my work well and I never dreamed that I would ever be dismissed from a job.

Q Isn't it true that when someone comes to the public defender's office, and seeks assistance of the public defender to represent them in court, they are met by secretaries who discuss their situation with them; is that true or isn't it. [69]

A Sometimes. Sometimes the secretary will discuss a situation with a defendant. But if a legal question becomes involved, they have no authority.

Mr. Barone is, was very strong about that. It must go to an investigator or to a lawyer.

Q Isn't it true, the secretaries in your office are the ones who make the determination as to whether a person is eligible for assistance, generally speaking?

A Absolutely untrue. If a secretary ever did, and it became known, she would have some job explaining the situation.

Q Was there a confidential relationship between you and Mr. Barone, the public defender, concerning cases upon which you were appearing, representing the public defender's office?

A If an accounting to Mr. Barone

about my files that I must treat as confidential between the client and myself is a confidential relationship of the nature that you are talking about, the answer is yes. I discussed my files with Mr. Barone.

If I had a problem I would go to him with it. I didn't go to, I didn't hide problems from him. He was very helpful to me. Sometimes I felt not, but that's besides the point. [70]

Q When you were in justice court or county court, did you feel yourself to be an extension of Mr. Barone in that court?

A Very definitely. As all my papers were Frank Barone, Aaron Finkel, of counsel.

Q You were, if I may say so, his personal -- not his personnel -- his personal representative in court?

A Yes, I was.

Q You enjoyed along with that all the aspects of a personal relationship, including confidentiality; that's true, isn't it?

A I was an employee of an employer. My employer was the public defender.

Q Would you answer the question yes

or no?

A I owed him the confidential relationship of the principal agent, of the employer/employee. Yes, I did.

Q When Mr. Barone was not in the office, on vacation, out sick, who presided over the office and determined policy?

A I am glad you asked that question. Not me. At no time did Mr. Barone ever leave me in full charge of that office.

There was a period of time when he left Herman Vanellen in. There was a period when he left Mr. Nelson. [71]

There was a period of time when he might have left somebody else. I felt upset at times that he never did choose to leave me in charge of the office, never very upset, but you know --

Q Regardless of all the competence you had in the office, as you testified, competence you had in the pursuit of your duties as assistant public defender, you felt upset that he didn't leave you in charge?

A Yes.

Q Wasn't there a time when you were

a senior assistant public defender?

A Yes.

Q Who was the public defender at that time?

A I think I served as senior assistant only under Mr. Barone. I was up and down. However, it worked out best for Mr. Barone. I served as his assistant. I got bigger salaries, smaller salaries. I put in bigger time and smaller time as he directed.

Q Who is directly subordinate to the public defender in the public defender's office?

A There is an executive assistant, a chief assistant. There may be somebody else in between. The senior assistant -- scratch that.

Q Would you tell me the duties of a senior assistant? [72]

A My duties were pretty much the same as the assistant. I just handled a bigger load of cases. If there was, if the defender thought he had a particular problem in a particular court, he might call me up in the middle of the night or something like that and I had to straighten it out, based

on his directions.

Q Isn't it true that when you appeared in county court representing the public defender's office, you have responsibilities that were not well-defined and broad?

A No. I think they were well-defined. They may have been broad. Any attorney in any court has broad responsibilities, has a big job. He has to be on his toes at all times. But well-defined--

Q When you were in county court representing a defendant, did you formulate plans for the implementation of the goals which you were therefor, namely, to represent that defendant?

A I am sorry, I don't understand the question.

Q When you were in county court representing a defendant as an assistant public defender, did you formulate plans for the goals of the representation of that defendant? [73]

A Yes, I believe yes. I am still not absolutely sure about your question. I did try to do the best I could for the

defendant, yes; if that's what your question is.

Q You had wide latitude and discretion on how to proceed, didn't you?

A I didn't have that wide a latitude. I had to work within a certain framework. Mr. Barone called meetings from time to time and would say, for example, that if anybody dares take a plea for a guy who is on probation, you are in big trouble. I didn't have that kind of latitude where I could take a plea for somebody on probation.

Q In normal circumstances of representing the defendant as an assistant public defender or as a senior assistant public defender, and you had an opportunity to take a plea on occasion, in normal circumstances, did you call Mr. Barone and ask him if it was all right to take that plea or did you make your own decision?

[75]

*

A Not my reappointment. My being continued on the job.

Q Because you knew, didn't you, that if he were appointed public defender, you

would serve at his pleasure and he could discharge you without cause, is that correct?

A At that time that is not true at all, because back in July of 1977, I studied the constitutional law questions in this matter and I studied constitutional law very thoroughly. I was convinced that Mr. Branti or whoever the public defender was didn't have that power. But I did-- I was not privy to any of the machinations in the Democratic Party.

MR SCHOENBERGER: Your Honor, I move to strike that as totally not responsive.

THE COURT: Yes.

Q I show you a list of the former public defenders in office, the former staff, as part of our papers filed with the Court.

A Yes. [77]

*

Q Out of those names do you know who is still remaining on the public defender's staff today?

A I have no idea. I know what the

newspaper said, I know that from hearsay but I don't know who was actually appointed.

Q Thank you very much.

A I would comment on something --

Q Thank you very much.

MR. SCHOENBERGER: I have no further questions.

REDIRECT EXAMINATION

BY MR. WAGNER:

Q Isn't it correct and would it not be fair to say that as an assistant public defender your sole obligation was to represent individual indigent clients within the guidelines set down by Frank Barone in court on a case-to-case basis?

A Yes.

Q You had no role whatsoever in formulating overall policy?

A Absolutely none.

Q You might have formulated policy with regard to an individual case that you were appearing on within Mr. Barone's guidelines, is that correct? [78]

A That is correct. Mr. Barone was very, very adamant that nobody took over his administrative --

Q I think we discussed that.

Mr. Finkel, suppose you were offered what you thought was a good deal for your client and you advised, you counselled, you begged and cajoled him to accept the plea. If he insisted on pleading not guilty would you have to represent him and plead not guilty and proceed with this trial?

A I never controlled a client. I never pushed a client around to take a plea. If a client, well counselled, wanted to take a plea, sure I had that power.

Q Suppose that you felt that a particular defendant's going to trial was the dumbest thing that he possibly could do, but he insisted, do you have any authority to say to him that you won't represent him any more, or if you will do that I am leaving, or did you have to represent him as I directed?

A I did have with limited exception. There were, to be completely honest, there were times when I would tell, there were times when I would tell a client just to give him a cooling off period, or something like that, saying I won't represent you if

you do such and such, just to give, I would take some kind of action to give him time to [79] cool off if I had to. Generally, I did the client's will.

MR. WAGNER: Nothing further.

RECROSS EXAMINATION

BY MR. SCHOENBERGER:

Q When you spoke to a client and gave him that time to cool off, or counselled him as to whether to take a plea or not, you did all that based upon your own discretion without calling Mr. Barone up on the telephone asking if that was correct?

A I had to do things.

Q It is correct?

A Yes.

MR. SCHOENBERGER: Thank you.

(Witness excused.)

MR. WAGNER: At this time, your Honor, I would like to call plaintiff Alan Tabakman to the stand. [80]

A L A N T A B A K M A N, a plaintiff, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q Mr. Tabakman, did there come a time when you assumed the position of assistant public defender for County of Rockland?

A There did.

Q I show you here a document and I ask you if that is the oath of office or a copy of the oath of office which you swore to and filed with the County Clerk.

A It is a copy, and that is my signature.

MR. WAGNER: Any objection?

MR. SCHOENBERGER: No objection.

MR. WAGNER: I offer it in evidence as Plaintiffs' Exhibit 9.

THE COURT: Received.

(Plaintiffs' Exhibit 9 was received in evidence.)

Q Mr. Tabakman, you were appointed by Frank Barone, is that correct?

A Yes. [81]

Q At the time of your appointment, sir, did you believe your appointment to be temporary or permanent?

A I believe my appointment to be permanent.

Q You have heard Mr. Finkel describe the duties of an assistant Public defender. Without going into great detail, were your duties essentially similar to his?

A They were essentially the same duties. I would add that I was never a senior assistant public defender or an executive assistant public defender. Since the time of my appointment I was only an assistant public defender. The duties were essentially the same other than with the limitations that I have just mentioned.

Q To represent indigent clients to the best of their interest within the guidelines set forth by Mr. Barone?

A Yes.

Q You didn't ever exercise any policy making powers in that office?

A No.

Q Was your relationship with Mr. Barone as your employer a confidential

relationship other than the normal confidence that an employer expects of an employee?

A No. It was not. [82]

Q In the course of your employment as an assistant public defender were you ever reprimanded?

A I was never reprimanded, not by Mr. Barone.

Q Were you ever reprimanded by anyone over you, whether Mr. Barone or his executive assistant or anyone?

A No.

Q Were any compliants ever made to you about the quality of your work?

A To the best of my knowledge,no.

Q Did there come a time in some time late 1977 when you became aware that Mr. Barone's term which was expiring was expiring and that he would not be reappointed?

A Yes. I did become aware of that.

Q Did you subsequently become aware either through political rumor or newspapers or what not that Mr. Branti was being considered for the job of public defender?

A I did become aware of that also.

Q As the result of the fact that you

believed Mr. Branti to be the next public defender did there come a time when you had a conversation with Mr. Branti more specifically at the Christmas cocktail party of the District Attorney of Rockland County, [83] Mr. Kenneth Gribetz?

A Yes. I did have a conversation with him.

Q Mr. Tabakman, what was the gist of that conversation?

A I believe at that time that Mr. Branti was, so to speak, the shoo-in as far as the public defender's office was concerned or the appointment to it.

I had spoken to Pete, Pete had indicated to me that he liked me. He would have liked, he would like to keep me in the office. He told me that he didn't have the power to make the appointment. The power to make those appointments was with the Democratic caucus, specifically with the 11 Democratic legislators who had recently been elected in the early part of November.

Q Did he make any suggestions as to any procedure which you could follow to gain the approval of the Democratic caucus?

A Well, to gain the approval of the Democratic caucus was to find a Democrat, find a Democrat to sponsor you. Then you could stay in the office.

Q Did he at any time --

THE COURT: Did he say that?

THE WITNESS: I would have to find a Democrat to sponsor me. [84]

THE COURT: He said that?

THE WITNESS: To me.

Q His words were you have to find a Democrat to sponsor you?

A Yes. that is right.

Q Did Mr. Branti at any time during that conversation or at any time prior to today ever state to you that he could not retain you as an Assistant Public Defender because your partner had been elected a Town Justice?

A No. He never said that to me. I wish that he would have given me the opportunity. If he would have spoken to me about that, I wish he would have done that.

Q Mr. Tabakman, did you ever as a regular assignment appear as the assistant public defender in the Town of Clarkstown?

A No.* [88]

CROSS EXAMINATION

BY MR. SCHOENBERGER:

Q Mr. Tabakman, as an attorney do you consider yourself to be a person of high ethical standards?

A I try to be. Not only as an attorney, by the way.

Q I am glad to hear that. Have you ever seen this opinion before?

A Not until today.

Q Have you read it?

A Yes.

Q Anywhere in that opinion does it limit or make reference to the fact of a partner who was a public defender appearing in the same court as the other partner who is a Justice Court Judge?

A It apparently does.

Q Isn't it true that that opinion is a very broad opinion saying that an assistant public defender cannot appear in any court, cannot practice law as an assistant public defender if his partner is a Judge?

A I don't know if I would characterize it as a broad opinion. It is an opinion.

Q Is the characterization I just gave, isn't that correct? [89]

A What was that, what characterization? Broad?

Q The characterization that as an attorney who is a public defender.

A If your law partner is a justice that you cannot act as a public defender. That's apparently what the opinion says.

Q It doesn't limit it merely to the court in which the partner is the Judge, isn't that correct?

A That's apparently what it says.

Q You spoke to Mr. Branti at the Christmas cocktail party?

A Correct.

Q Were you alone?

A No.

Q Who was there?

A Mr. Wray, my partner.

Q Anyone else?

A There were a lot of people there. I don't believe that they heard what took place as far as the conversation was concerned.

Q But Mr. Wray, your partner, the now Judge Wray was there with you, wasn't he?

A Correct. The assistant public

defenders were invited to the party, he was an assistant public defender at that time and a judge elect. [9(

Q What is your registration?

A Republican.

Q Has anyone coerced you to change your registration to Democrat?

A To change my registration to Democrat?

Q Yes.

A I haven't changed my registration.

Q Has anyone attempted to coerce you to attempt to get you to change your registration?

A No.

Q Has anyone made your job conditioned upon contributions to the Democratic party?

A No.

THE COURT: You are talking about the job he used to have, I take It?

MR. SCHOENBERGER: Yes, sir.

Q Did anyone condition your reappointment upon your allegiance to the Democratic party?

A Not allegiance to the Democratic party.

MR. SCHOENBERGER: Thank you very much.

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* [92]

MR. WAGNER: No further questions.

MR. SCHOENBERGER: I have no further questions.

MR. WAGNER: The plaintiffs wish to call Judge William Wray, Jr.

W I L L I A M W R A Y, J R., called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q Mr. Ray, do you currently hold any governmental position?

THE COURT: State your full name for the record.

THE WITNESS: My name is William Wray. I was elected to the position of Clarkstown Justice.

Q Do you currently hold any form of governmental employment?

A In November I was elected to be Clarkstown Town Justice in the Town of Clarkstown. I was officially sworn in yesterday morning.

Q Judge Wray, were you present at a conversation which took place between the

plaintiff Al Tabakman and the defendant Peter Branti during the latter part of December at a cocktail party hosted by Kenneth Gribetz, the District Attorney for [93] Rockland County?

A Yes, I was.

Q Did you have occasion at that time to participate in or to overhear a conversation between plaintiff Tabakman and Defendant Branti concerning plaintiff Tabakman's reappointment or continuation as an assistant public defendant?

A We were all talking, but mostly I was listening.

Q Could you tell us as best as you can recall the gist of that conversation?

A The gist of the conversation was that, of course we would like to have Alan reappointed as public defender, and Mr. Branti said that he didn't have any objection to that. But that he didn't have any control of that and that it would be in our best interest to try to get the Democratic legislator to put Alan's name into the political process.

Q Did Mr. Branti at that time tell you or give you any information as to how the appointments or reappointments to

assistant public defender were being made?

A I am not sure if Mr. Branti did, although in conversations with him and others in the Democratic party, we were told that Mr. Tabakman's name --

MR. SCHOENBERGER: Objection, your Honor. It appears to be a hearsay [94] conversation.

MR. WAGNER: I will withdraw the question.

THE COURT: Just a second. Let us have the conversation limited to the conversation with Mr. Branti.

THE WITNESS: I believe I would have to say that we were told that the names should come from Madam Troy, the Democratic Chairwoman of Clarkstown.

Q Mr. Wray, at the time Judge Wray, at the time that you were elected Town Justice of the Town of Clarkstown, did you have occasion to review either by yourself or with plaintiff Tabakman the applicable rulings of the audit control and the Attorney General concerning the practice by a law partner before other courts within the county

or other co-equal justice courts?

A Yes, I did, both at the time that I was elected and before I decided to run.

Q What did you determine from that investigation?

A It was determined by --

MR. SCHOENBERGER: Objection. It requires a legal conclusion.

MR. WAGNER: I will withdraw the question, your Honor.

Q Can you tell us what these opinions were and who rendered them? [95]

A We discussed it on numerous occasions with Mr. Barone. I understand there were opinions from Audit and control and it was our understanding that as long as Mr. Tabakman didn't appear in the particular Justice Court in which I was sitting, that he would be perfectly qualified to continue as a public defender.

MR. SCHOENBERGER: Objection, your Honor, to that entire answer. I will ask that it be stricken as hearsay.

THE COURT: It will be stricken.

Q Mr. Wray, do you know of any situations in Rockland County where partners of

town or village justices practice not before their partner but in other courts of equal jurisdiction?

A Yes.

A Is it to the best of your knowledge and information an accepted practice?

A Yes, it is.

Q Mr. Wray, you are of course a member of the firm of Freedman, Wray, Wagner & Tabakman?

A Yes.

*

[100]

Q Have you seen this opinion of the --

A Yes, I read the papers. I did.

Q The opinion doesn't only speak of partners?

A I think that opinion can be distinguished.

Q May I ask my question?

A Yes. You certainly may.

Q That opinion does not only speak of partners, of Town, or Village Justice practicing before other Town Justices but it does

more specifically speak about public employees such as public defenders whose partners are judges?

A Yes.

Q Do you know of any other public defenders, assistant public defenders or municipal employees in the County of Rockland whose partners are judges that practice in those courts?

A I can't specifically name anybody.

Q Do you, sir, feel that there will be an impropriety if a public official like an assistant public defender whose partner was a Town Justice appeared before another Town Justice in the County of Rockland? [101]

A No. I don't.

MR. SCHOENBERGER: Nothing furthur, your Honor.

THE COURT: Mr. Wray, getting to this conversation that you had with Mr. Branti, was anything said at the time about the problem that would be created by your being the Town Justice with Mr. Tabakman being in the public defender's office?

THE WITNESS: In all the conversations we had with anybody in the political process that was never mentioned. I

believe that has been brought up I think personally as an afterthought.

THE COURT: Any further questions?

MR. WAGNER: Yes, sir.

REDIRECT EXAMINATION

BY MR. WAGNER:

Q To the best of your knowledge is there any other assistant public defender who has a law partner who is a judge?

A I really can't think of anybody at the minute. There are judges, Town Justices in the county who have partners going into other crime, to Justice Courts handling criminal cases, and I don't see why it should be any different for an indigent defendant as for a regular [102] defendant.

MR. WAGNER: Nothing further, your Honor.

MR. WAGNER: The plaintiffs call Theodore Dusanenko.

THEODORE DUSANENKO, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q Where do you reside?

A 2 Scott Drive, New City, New York.

Q Do you presently hold any official position in the county government?

A Yes, I do.

Q What is that position?

A County Legislator.

Q When were you first elected County Legislator?

A 1969.

Q You were just reelected in this past election of 1977, is that correct?

A Yes, I was.

Q Mr. Dusanenko, were you not at one time the minority leader of the County Legislature? [103]

A Yes, I was.

Q Mr. Dusanenko, are you familiar in any way with the political process involved in the appointments of department heads of

the County of Rockland by the County Legislature?

A To a large extent, yes.

Q Are you familiar in any way with the circumstances surrounding Mr. Branti's appointment?

A Yes, I am.

Q Could you tell us what you know of your own knowledge concerning that appointment?

A Mr. Branti, I may add, is a very qualified gentleman, was the choice of the majority caucus of the Rockland County Legislature and by majority caucus I mean the 11 of 18 members who were affiliated with the Democratic party who have the controlling power in that legislature.

Q Were you ever approached or consulted by the Democratic caucus or any of the members thereof concerning either the appointment of the public defender or the appointment of any of his assistants?

A Not in that department or any other department.

Q Did you ever make inquiries of any of the members of the Democratic caucus [104]

as to whether they would consider the appointment of anyone that you sponsored?

A Yes. I had asked several individuals to consider the continued employment of some individuals and that was all that I had asked.

Q What answers did you receive when you requested that?

A Of who?

Q Well, all right. I will withdraw the question.

Who did you ask to continue the employment of various individuals in appointed positions?

A I asked Legislator Goodfriend, I asked Legislator Colman, I asked Legislator Meehan, I asked Legislator Damiani, I asked Legislator Rotella.

Q Did any of these legislators react in any way to your request that they consider appointing people that you recommended?

THE COURT: Appointing to what?

MR. WAGNER: Withdrawn.

Q What position did you discuss?

I will withdraw that too.

Did you ever have occasion to discuss the assistant public defenders? [105]

A Yes.

Q Did you have occasion to discuss the continuation of Mr. Finkel or Mr. Tabakman?

A Mr. Finkel's name I had not mentioned but I did mention Mr. Tabakman's name.

Q Mr. Dusanenko, you represent the Town of Clarkstown, is that correct?

A Yes.

Q Mr. Finkel is not one of your constituents but Mr. Tabakman is, is that correct?

A To the best of my knowledge, yes.

Q How did you ask to continue Mr. Tabakman in employment?

A The people who I previously named.

Q You asked all of them?

A Yes. And I also asked Mr. Branti to find out, not specifically, I said what is the procedure that would be used for continued employment, et cetera.

Q What did Mr. Branti tell you?

A At that time, that the decisions were made, and it is beyond his ability to have any imput into those decisions at that point in time.

Q Did he tell you by whom the decisions were made? [106]

A No.

Q Did any of the other County Legislators respond in any way to your request that Mr. Tabakman be kept on?

A Some said it was imperative to have a sponsor to be on a Town Chairman's list or on a list of several legislators.

Q Did they define --

MR. SCHOENBERGER: Your Honor, I will object to all of that as hearsay.

THE COURT: Overruled.

Q Did they tell you, Mr. Dusanenko, what the definition of a sponsor was?

MR. SCHOENBERGER: Objection. Hearsay.

THE COURT: Let's see. Mr. Goodfriend is a defendant.

MR. WAGNER: Mr. Dusanenko is a defendant.

THE COURT: Mr. Coleman is a defendant.

MR. WAGNER: If I can save the Court some time all the individuals mentioned by Mr. Dusanenko are all county legislators and also co-defendants.

THE COURT: Overruled.

A What does that mean?

Q That means you can answer.

Did any of the other county legislators with whom you spoke define what they [107] meant by a "sponsor"?

A I was never clear in my mind because on occasion some people spoke that it would be the caucus, when they met. Some people said that the recommendations from individual legislators participating in the caucus would be helpful and other cases some people led me to believe that the political town chairman would pose or prepare such lists.

Q Taking them one at a time, would the sponsorship by a legislator have to be the sponsorship by a Democratic legislator?

A The representatives had no say in that matter.

Q I am not sure you understand my question.

You said that one form of sponsorship might be by a legislator. Would that have to be a Democratic legislator or could a Republican legislator have sponsored an individual and had him accepted?

A I myself had no participation into any appointments. We were not invited

to the Democratic caucus. All these choices were made by the Democratic caucus.

Q I don't think I have to ask you what the Democratic caucus is since it is evident. [108]

You also mentioned possible sponsorship by Town Chairmen. Did that mean sponsorship by either Republican, Democrat or Liberal or Conservative chairmen?

A To those people I spoke to, they were only discussing Democratic Town Chairmen at that time.

MR. WAGNER: Thank you.

I have no further questions, your Honor.

CROSS EXAMINATION

BY MR. SCHOENBERGER:

Q Did any of the legislators you spoke to tell you that Mr. Tabakman would have to switch allegiance to the Democratic party, give money to the Democratic party, or support to the Democratic party to be reappointed?

A No.

Q You were not invited to the Democratic caucus, were you?

A Never.

Q You were not there when the Democrats caucused?

A No.

Q So you do not know for a fact whether these choices were made by the Democratic caucus, do you?

A Yes.* [110]

Q You do know that the public defender appoints his assistants, don't you?

A Yes.

Q Once again, you were not at the caucus?

A That is correct.

Q You don't know whether the assistants chosen by the public defender were chosen by the caucus, do you?

A Only through conversations, with others. I was not present at them.

Q But of your own knowledge?

A That's the knowledge I have, is from conversations with other people.

Q Of your own personal knowledge not based upon hearsay?

THE COURT: Counsel, there are a number of people that he has testified to

conversations with, who are defendants in this action.

I don't regard his conversations with those persons as being hearsay. I am interested in knowing what those conversations were if there were such conversations. So, please don't restrict him so much. [111]

BY MR. SCHOENBERGER:

Q You testified that you spoke with Mr. Goodfriend?

A Yes.

Q Do you recall the nature and extent of that conversation?

A Yes, sir.

Q Could you tell us in court what that conversation was?

A Yes.

It was in the offices of the General Fiscal Services in the same building and at that time I asked what was necessary in order to save one or two individuals who are currently or previously, let me say employed during 1977 in the public defender's office, that was Mr. Alan Tabakman and Mr. Manny Sanchez. In that conversation Mr. Goodfriend

suggested, well, if anything could be done he would be in favor of Mr. Sanchez, but on the other hand Mr. Tabakman was too closely associated with an opposition political party.

Q He never indicated to you, did he that the decision not to hire Mr. Tabakman was made in caucus, did he?

A I don't know. As you said I wasn't there. That part of a conversation was never discussed about who was not going to be returned. I think at that time whatever conversations took place were about the number of jobs, the ratio of the positions and the individuals who were going to receive new jobs, rather than deciding on which individuals previously employed were going to stay. [112]

Q Once again did Mr. Goodfriend or any other legislator, Democratic legislator, tell you that Mr. Tabakman or anyone else's job, excuse me, that Mr. Tabakman's job was conditioned upon him swearing allegiance or supporting the Democratic party; did they?

A You asked that before and I said no.

MR. SCHOENBERGER: No further questions, your Honor.

REDIRECT EXAMINATION

BY MR. WAGNER:

Q Mr. Dusanenko, you mentioned that you spoke to some four or five individuals concerning the retention of Mr. Tabakman in his position. Did any of those individuals ever mention or bring up anything involving the fact that Mr. Tabakman's partner had been elected judge and therefore Mr. Tabakman was not eligible for that job?

A Yes.

Q Who brought that up? [113]

A The same Mr. Goodfriend.

Q Was that at the same conversation when he referred to the political allegiance?

A Yes.

Q Which did he refer to first, if you recall, political allegiance or the fact that his partner had been elected judge, or was it part of the same conversation?

A It was part of the same conversation.

Q In your opinion, Mr. Dusanenko, when Mr. Goodfriend -- who I believe was the former chairman of the county legislature?

A No.

Q The majority leader?

A I don't believe so.

Q All right. I am wrong on that.

Mr. Dusanenko, when Mr. Goodfriend referred to Mr. Tabakman's active participation with an opposition faction, in your opinion was he referring to the fact that he was the partner of a Republican Town Justice who had just run and been elected?

A Yes.

MR. SCHOENBERGER: Objection, your Honor.

THE COURT: Overruled. [114]

MR. WAGNER: No further questions.

THE COURT: I want to get back to this conversation that you had with Mr. Branti. He told you that the decisions had already been made with respect to who the new assistant public defenders would be and he could not have an input.

THE WITNESS: He didn't say the first part of that, I don't believe, your Honor. I think he stated that the decision was out of his hands. I don't believe he elaborated on it any further.

THE COURT: Did he say whose hands it was in?

THE WITNESS: I don't believe so.

THE COURT: Thank you.

(Witness excused.)

MR. WAGNER: Your Honor, for the purposes of this motion, the plaintiffs rest.

THE COURT: All right.

MR. SCHOENBERGER: Your Honor, at this time I would like to make a motion.

The motion is to deny the preliminary injunction and dismiss the temporary restraining order on the basis that the plaintiffs have failed to meet the quantity of proof necessary in this case and have failed to set out a prima facie case.

THE COURT: I will reserve decision on that. [115]

MR. WAGNER: May I be heard in opposition or would your Honor rather go on with the hearing?

THE COURT: I would rather go on.

MR. WAGNER: I will reserve my argument until the conclusion of the hearing.

MR. SCHOENBERGER: I call Mr. James K. Anderson.

J A M E S K. A N D E R S O N, called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHOENBERGER:

Q Mr. Anderson, are you employed by the County of Rockland.

A I am.

Q In what position?

A Personnel officer.

Q Can you correlate for us what a personnel officer is under the civil service law?

A Under the state civil service law he is in charge of the administration of the civil service law for the County of Rockland and all civil divisions therein.

Q Can you briefly explain to the Court and to all of us the different classifications of employees within the County of Rockland? [116]

A The classification of employees in the County of Rockland, under the statewide classifications system all public employees are divided into two broad classes, the unclassified and classified.

The unclassified service consists of elected officials and teachers essentially. The classified service comprises all others.

The classified service in turn is divided into four broad jurisdictional classes, one being the competitive class which has the requirement not only of minimum qualifications, but the requirement of passing a competitive examination.

The non-competitive class, the second class, is similar to the competitive class, having minimum qualifications, but no examination, formal examination is required on a competitive basis.

A third class in terms of numbers is a labor class, which consists essentially of unskilled laborers.

In the fourth class, the smallest of all the classes is called the exempt class, a category for which no examination is deemed practical or feasible for the reason that the positions in the exempt class essentially are those of a deputy or somebody in a confidential relationship to its principal. [117]

Q Am I correct in understanding

that one of the characteristics of the exempt class is that the principal would have a confidential relationship to his appointees?

MR. WAGNER: Objection. It is a question of law, and No. 2, I don't think the witness is qualified to answer it.

MR. SCHOENBERGER: Your Honor, he acts as a Civil Service Commissioner for the County of Rockland and he is certainly qualified to answer it.

THE COURT: Overruled.

A The positions are placed in the exempt class because of the, of a policy determination, carrying out some of the major functions of the principal as though the principal were present, or a confidential relationship. All three or any one of those factors may be present in the determination of a position being placed in the exempt class.

Q How many, approximately, how many employees are employed by the County of Rockland?

A Roughly 2,000, sir.

Q Out of those approximately 2,000 employees in the County of Rockland, do you

know either exactly or approximately how many belong in that exempt class? [118]

A Under 50.

Q Are attorneys in the county attorney's office, public defender's office, and district attorney's office included within the exempt class?

A Mostof them.

Q Are assistant public defenders included in the exempt class?

A Yes. They all are.

Q Are assistant county attorneys included in the exempt class?

A Assistant county attorneys, by that title are all included in the exempt class.

Q Approximately how many exempt attorneys are there in the county attorney's office, public defender's office, and district attorney combined?

A May I refer to my notes?

Q Yes, you may.

Do you need some notes to refresh your recollection?

A It's approximately 34, counsel.

I would like to look at my notes.

MR. WAGNER: I will accept that approximation, your Honor.

THE WITNESS: All right. [119]

Q That's 34 out of approximately 50?

A Yes, sir. Actually there are 42 positions other than some special education aides, there are approximately half a dozen specialized at the Mental Health Center. There are 42 remaining positions that would fall in the category of deputy or confidential relationship. Of those 42, three are secretarial or assistant types such as a secretary to the district attorney, confidential secretary to the president of the Community College, and the assistant to the chairman of the County Legislature. Deputy county clerks, deputy county treasurer, the head of the Office of Civilian Defense and Emergency Services. That should add up to about 7 or 8, all the rest of them are attorneys in the three offices of the county which employ attorneys, the district attorney, the county attorney and the public defender.

Q Could you explain to us who appoints an exempt appointee to his job and what his term of office is, if there is a term and

how is it determined that his tenure may end?

A Under the civil service law of the State of New York, the appointing authority in most cases is a single individual although it may be a board or commission. [120]

Q Is that generally the department head?

A The department head. It may be a single head or a commission will make the appointment of a, to an exempt class position. There is no review of qualifications of any appointee to an exempt class position.

The incumbents of exempt class positions are deemed to hold their position at the pleasure of the appointing officer without restriction as to appointment or removal.

Q Is there such a thing as a permanent appointment of an exempt man so that he can remain in office and succeed his appointing authority?

A No, sir.

Q When an individual is appointed to an exempt position he is required to take an oath of office, is he not?

A All employees are required to take an oath of office including those appointed to an exempt class position.

Q I show you Plaintiff's Exhibit 2, Plaintiff's Exhibit 4, and Plaintiff's Exhibit 6. Do any of those indicate to you an appointment beyond the pleasure of the appointing authority?

A They do not. [121]

Q Do you know what the purpose of those letters are by any chance?

THE COURT: There is not a question in this case but that the appointment is at the pleasure of the public defender. I don't see any point in offering evidence on that subject. The testimony of the plaintiffs' witnesses have been to that effect.

MR. SCHOENBERGER: Your Honor, the reason that I am doing this is that plaintiff Finkel is taking the position that he is permanent and cannot be discharged. I wanted to clarify it.

THE COURT: I don't care what position he is taking. I don't think there is any question but that the appointment is at the pleasure of the appointing authority.

The issue in this case is how that pleasure is exercised.

MR. SCHOENBERGER: Just a brief few more questions, your Honor.

Q I would like you to look at Plaintiffs' Exhibit 5, 3 and 1, all purported to be reports of personnel changes. Are you familiar with those forms?

A I am.

Q Can you tell me who processed forms like these?

A They are initiated by the appointing authority and proceeds through [122] my office, the personnel office of the County of Rockland.

Q The appointing authority is the one who solely determines the qualifications of his appointee, am I correct?

A That is correct.

Q Whatever they put on that form would be satisfactory to you?

A No, sir.

Q If they were to check a box that someone was permanent would that make him permanent?

A No. It would not.

MR. SCHOENBERGER: Nothing further, your Honor.

CROSS EXAMINATION

BY MR. WAGNER:

Q Mr. Anderson, to what political party do you belong?

A I am a registered Democrat, sir.

Q When were you appointed as a county personnel officer?

A I was appointed in November, 1961.

Q Were you appointed for a set term or was it at the pleasure of the County Legislature or Board of Supervisors? [123]

A Under the Civil Service Law of the State of New York the personnel officer has a fixed term of six years. I was initially appointed by the Board of Supervisors, reappointed by a Board of Supervisors which was Democratically controlled and reappointed by a County Legislature which was Republican controlled.

Q When was that last reappointment?

A Approximately four years ago, sir.

Q Your job is not civil service?

A it is in the non-competitive class of the classified service, yes.

Q I am a little bit hazy on your terms. You are appointed for a set term but you are protected by the Civil Service

Law, you cannot be discharged at the discretion of your employer?

A That is correct. I am protected under two categories, one as a war veteran in the non-competitive war veteran under Section 75 of the Civil Service Law of the State of New York, and as a public officer holding a specified term of office pursuant to the public officers law.

Q Mr. Anderson, you indicated that there were some approximately 50 employees in the class of Mr. Finkel and Mr. Tabakman [124] which I think you said was non-competitive.

A No, sir. It is not non-competitive in the sense that the word is used in the Civil Service of the State of New York. They are in one of the four jurisdictional class categories as exempt.

Q I see. There are some 50 employees of whom you said I believe 43 were attorneys?

A No, sir. I said there are approximately 50, or under 50, a half dozen or some being special education aides in our mental health center, 42 being in the category of policy determiners, policy carry outers with a confidential relationship.

Of the 42, 34 give or take one or two are attorneys.

Q Of those 34 who are attorneys, and I believe that embraces the county attorney's office, the district attorney's office and the public defender's office, are you familiar with the political make-up of those appointees?

A I am not.

Q Do you know whether any of those appointees currently is a Republicans?

A I do not, of my own knowledge.

Q Is it your opinion, Mr. Anderson, that a public defender or a district attorney [125] or a county attorney has the unlimited right to terminate his employees, deputies, for any reason whatsoever?

A In the categories, yes. To that extent, yes.

Q Mr. Anderson, if the civil service rules or state law conflict with the --

THE COURT: Could it be because he is black?

THE WITNESS: No, sir. I am saying under the civil service law, and that is --

THE COURT: I heard just exactly what you said. But are you saying that

because he has this absolute right to discontinue somebody, he can do it because he is for example black or because he is Jewish?

THE WITNESS: Under the civil service law, he could. He would have other remedies and I am not saying that he doesn't have other remedies under other statutes but not under the Civil Service Law of the State of New York. He would have remedy under other federal statutes but under the Civil Service Law of the State of New York as an exempt class employee, the appointing officer has a full right to employ who he likes and discharge who he likes and for whatever reason.

THE COURT: And he can give the reasons and still do it and not be subject to attack under the civil service. [126]

THE WITNESS: Not under the Civil Service Law.

THE COURT: I take it a part of what you are saying is that under some of the other laws that you cited, state or federal, what he does can be undone.

THE WITNESS: Yes, sir.

BY MR. WAGNER:

Q In your opinion, if the civil

service rules or the state law are in conflict with or violate the U.S. Constitution should they be followed?

MR. SCHOENBERGER: Objection, your Honor.

THE COURT: I think I will sustain the objection.

Q Mr. Anderson, in your opinion and I am asking you this only in your own opinion, and if you don't have an opinion you can decline to answer. In your opinion do the federal laws and the federal Constitution protect an individual who is being terminated from a position he is performing successfully simply because of his political affiliation?

MR. SCHOENBERGER: Objection.

THE COURT: Sustained.

MR. WAGNER: Nothing further.

(Witness excused.) [127]

MR. SCHOENBERGER: I call the public defender, Peter Branti, Jr.

P E T E R B R A N T I, J R., called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHOENBERGER:

Q Are you an employee of the County of Rockland?

A Yes.

Q Can you tell me your position, please?

A As of January 3rd I am the public defender of Rockland County.

Q 1978?

A Yes. That is correct.

Q As a public defender of Rockland County do you have a staff, part of which consists of assistant public defenders?

A That is correct, sir.

Q Can you tell me what was involved, the process you went through in determining who was to be your assistant public defenders?

A If I may, and with the Court's indulgence, in about March or April of 1977 I decided that I would leave the District Attorney's office, if I could, and seek the post [128] of public defender. At that time I made my feelings known to certain individuals, some were politicians, others were attorneys. One of the attorneys I spoke with was a Mr. Feinberg. In March of 1977 or April, whatever

it was, I had decided that if I became public defender, Mr. Wayne Feinberg would be my chief assistant and I asked him at that point if he agreed.

I made my feelings known to both Democrats and to Republicans that I thought I was a very capable attorney in my opinion, and I wrote a letter to the Chairman of the Rockland County Democratic Party.

In that letter I indicated to her my qualifications, that I was interested in the post and that I would be happy to meet with any group of people and supply a resume, if they were so interested. The letter was never acknowledged by the Democratic Party. I want to make that clear now. I actively sought the post, and in November of 1977 I spoke with each legislator. I spoke with the Town Chairman, I spoke with both Republicans and Democratics about the position of public defender.

After the election it became clear that I was a valid contender for the public defender's post. And I spoke again to both Democrats and Republicans, one of the Republicans I spoke with was [129] Mr. Dusanenko.

I let it be known that it was not an elective post and that I wished to discuss my appointments with anyone who was sitting on that body, that I would like to discuss names of attorneys that were available, but that one thing each individual had to understand that any name that was supplied to me I would have the right to veto it because I was familiar with every criminal attorney in Rockland County. I had discussed many names.

At no time was I ever threatened to hire anyone, nor was I threatened to fire anyone from the public defender's office.

I spoke with Mr. Sanchez who was a member of the firm of Freedman, Wray, Wagner & Tabakman as early as May of 1977 or June. I believe Mr. Tabakman was present at that time. It was at a picnic held for an assistant district attorney who was leaving the office.

I made it clear to everyone who was sitting on the legislature, and in particular the Democrats that Bill Nelson would remain in the public defender's office.

Mr. Nelson is a black attorney

that started with me in the district attorney's office, and probably the most competent attorney in the public defender's office. [130]

MR. WAGNER: Your Honor, up to this point I have not objected to the narrative form of the testimony. I believe we are getting far afield. I concede the qualifications of Mr. Nelson. He is a friend of mine too, but why don't we get on with the selective processes.

MR. SCHOENBERGER: One of the questions is how were the public defenders to be hired and not to be hired. This is a process that he is presenting to us.

THE COURT: Let us go on. It is twenty to seven, gentlemen.

A The point I am trying to make, your Honor, is that Mr. Wayne Feinberg--no one from the Democratic caucus ever spoke to me about Wayne Feinberg, who is now the chief assistant public defender. No one spoke to me about Bill Nelson who is now the executive assistant, and then a former chief assistant public defender. John Allison who was an assistant public defender at this point and an assistant district attorney until June 3rd, I talked to him in March of 1977, when he told me

that he decided he wanted to leave the employ of the district attorney's office. At that point I asked him "John, stay with us until the end of the year. If by some stroke of good fortune I should get to be public defender [131] you will have a job with me. If you don't, I will do everything in my power to try to help you because you are a competent attorney."

No one came to me and said, "You must take Allison with you, you must take Wayne Feinberg with you, and you take a, leave Bill Nelson in the office."

Mr. Dusanenko came to me about Alan Tabakman, one of the plaintiffs. Madam Troy, a Democratic chairman for the Town of Clarkstown, a Democratic chairman came to me about Alan Tabakman. And I said I would see what I would do. I received about 50 telephone calls from individuals who wanted six positions which were left in the public defender's office.

Each one that I wanted to get rid of I would send to certain individuals. There is no question that the Democratic caucus played a part in the selection of

the six remaining positions, but we tossed many names around. I never attended a caucus meeting. I didn't even know when caucus meetings were held. I spoke with the chairperson of the Democratic party who asked me questions about certain lawyers, if I thought they were qualified, would I be willing to work with them, could I work with them.

One of those individuals was a person I selected, a Mrs. Laurna Bernard. [132] I met Mrs. Bernard two or three years ago when she--I believe at the time was, had made known her intention to run in a primary or a family court for a family court judgeship. I remember reading the report at that time that came out. I don't know whether it was a Bar Association Committee or not, but she had the highest rating of all the individuals at the time. I was happy for Mrs. Bernard at that point. I said I would like you to come to work for me. She said she was interested. I let my wishes known to the Democratic chairperson of the party. I went through each of my appointments that I made in exactly the same way. I spoke

with Mr. Barone, on numerous occasions about his staff. I spoke with him about Mr. Tabakman.

I asked Mr. Barone if Mr. Tabakman was still a partner with Judge William Wray. He ~~told~~ me, yes, but there was nothing wrong with it. I said that's your opinion. I asked about Manual Sanchez, and he said yes, he is an associate. Mr. Sanchez did come in fact to see me, as a man. Mr. Sanchez didn't bring Judge William Wray with him when he came to see me. He said, "I need a job. My wife is pregnant."

I said, "Are you an associate in the firm?"

He said, "Well, I do have an association but we will be breaking it up [133] shortly." I appointed Mr. Sanchez. I was at a cocktail party held by the members of the district attorney's office of which I was the executive assistant D.A., a party that the general public was invited to in a small confines of the district attorney's office.

I was approached by Mr. Alan

Tabakman together with Judge William Wray, a man who had been elected. A man who knew that my staff, if I became public defender it was common knowledge at that point --

MR. WAGNER: Objection.

THE COURT: Sustained. We want the testimony, not the argument.

I think we better go back to questions.

BY MR. SCHOENBERGER:

Q At the Christmas cocktail party, when Mr. Wray and Mr. Tabakman approached you--speaking from your own personal feelings, your own personal impression--did you feel that they were trying to pressure you?

MR. WAGNER: Objection. It calls for a conclusion.

THE COURT: Sustained.

Q Did you feel that it was improper for a Judge from the Town of Clarkstown -- [134]

THE COURT: Objection sustained.

Q Is it or is it not true, that your single criteria in selecting people for the public defender's office to be your assistants was quality and competence?

A That was most of my criteria. I would take a person with less experience than someone else who didn't have a private practice that wouldn't interfere with the position, that I could work with and train to fit in what I thought a public defender's office should be. I wanted no appearances of poor ethics.

MR. WAGNER: Objection, your Honor. We are getting back to the narrative testimony again, now.

I think the question has been answered, sir.

Q Did you feel it was an impropriety?

MR. WAGNER: Objection again. I am sorry you didn't finish.

Q Do you feel that it will be an impropriety and reflect poorly upon your office as public defender if you had an assistant public defender whose partner was a justice in the Town of Clarkstown?

A I feel that it would have been an impropriety to have a public defender who had a partner as a justice in any town in Rockland County, sir. I am certain the district attorney would

have something to say about it if I did do that, and rightfully so. [135]

Q After you determined which people you yourself wanted in your office to be a part of your office, were there still some vacancies?

A There were six vacancies.

Q At that time in the process of determining how to fill the six vacancies, did you seek recommendations from the Democratic and Republic parties in Rockland County?

A I sought them primarily from the Democratic party. I did speak to Mr. Dusanenko about Mr. Tabakman. I never spoke to Mr. Dusanenko about Mr. Sanchez.

Q Even if a name was referred to you by the Democratic party did you or did you not have an understanding that you had veto power?

A That is correct. I made that clear, if I may just expand on the answer; I made that clear. I refused to comment on whether or not I was going to be the public defender until everyone else knew that that was going to be the way that I would accept the position.

Q When people came to you and spoke to you, you said you had some 50 phone calls, and I imagine numerous people came and spoke to you. Did you ever use the excuse that you had to get support, to get people off your back? [136]

A I always used that excuse.

Q Did you ever require any of your assistants to swear allegiance or support the Democratic party?

A Never.

Q With reference to Mr. Sanchez, did you keep him on with the specific understanding that you would terminate his relationship with the firm of Freedman, Wray?

A No. When he approached me for a job he made it clear that he would be severing the relationship.

Q If he had not made that clear to you, would you have felt it was an impropriety for him to work as an assistant public defendant?

A I would have written to Judge Gagliardi and asked his opinion on it.

Q You have been an assistant district attorney for how many years?

A 1972. I worked for six months as a volunteer right after being admitted to the bar, excuse me, after graduating from law school and being admitted to the bar because I had no other experience. I was a truck driver.

Q While you were employed at the district attorney's office did you have occasion to view the activities of the public defender's office? [137]

A I didn't finish my other answer.

In 1973 I took an appointment to the district attorney's office as the only full-time assistant district attorney that I knew of in the office at that point. Yes, I had a very close relationship with the public defender's office since 1973. I have seen public defenders come in and public defenders leave.

Q In your professional opinion, did you ever feel there was an improper relationship between the firm of Freedman, Wray, Wagner & Tabakman and the public defender's office?

A Definitely.

MR. WAGNER: Objection.

THE COURT: Overruled.

A It was common knowledge around the courthouse, and particularly in the district attorney's office it was joked about that the public defender's office was an annex of Freedman, Wray, Wagner & Tabakman.

Q Do you have any comments that you would like to make concerning the conduct of Mr. Tabakman and/or Mr. Finkel as assistant public defenders that you feel influenced you in your determination as to whether they should stay in your office?

A The individuals that I kept in the public defender's office were in my [138]
opinion the most competent trial attorneys on that staff. Mr. Nelson has an exceptional reputation. Mr. McAlevey, while not having a great deal of criminal experience prior to his entering the public defender's office has gained the respect of every assistant district attorney in Rockland County.

As a matter of fact, we call him Komikasi Jack because he will try any case at the drop of a hat.

MR. WAGNER: Your Honor, again I have to object to this narrative testimony.

THE COURT: I will overrule the objection.

A He has absolutely no fear whatsoever of the jury system or of a courtroom or of a jduge. He will fight tooth and nail on every case that comes down. That was the man that I wanted to stay on in the public defender's office with me. It was also my main competition for public defender. Mr. Sanchez has had a reputation among the local assistant district attorneys that worked the local courts as being tenacious on every case that he has. When a young assistant D.A. would come in to me and say Mr. X is a nice guy from the public defender's office or Mr. B is, I knew one thing, that he was getting his own way in the courts that that attorney was in. They continually came in and cried about Mr. Sanchez. I [139]
have had cases, I have had an opportunity I should say, to see Mr. Finkel work in the past five years. Mr. Finkel in my opinion is a competent attorney. I have seen Mr. Tabakman in the past two years or so,

on a limited basis as he indicated we had one felony case together where we selected a jury and it resulted in a plea. He is a competent attorney. I have seen him handle conferences, bail applications, discussions about clients that the district attorney would like to speak to on certain other matters, and I was not impressed with either attorney. But, they are competent attorneys.

The criteria I used with the men who stayed in the public defender's office, that I insisted that I wanted in the public defender's office, was a simple one, would I want these individuals to defend me if I needed them. That's the criteria that I tried to use.

Again, there is no question that I discussed each appointment with the Democratic caucus. I am not trying to deny that or to hide it. I felt they had an opportunity to submit names to me, that if I thought these people were qualified I would accept them if I so desired; if for any reason I didn't want them I had the right to veto them. As far as I am concerned I vetoed Mr. Tabakman. [140]

Mr. Dusanenko spoke to me about Mr. Tabakman and so did Mrs. Troy, a Democratic chairperson, in the town that he lived in. When I spoke to Mr. Dusanenko there were only limited positions available, there were discussions going on and I did tell him, I have no more imput at this point, I am waiting to see the names that are supplied to me before I accept or reject anyone.

I did say to Mr. Dusanenko at that point when he mentioned Mr. Tabakman's name to me, what his feelings were about Judge Robert Stolerich's law clerk. Judge Stollerich, excuse me, your Honor, is a Republican. I don't know whether his law clerk is a Republic or not but I have always been impressed with him.

Mr. Dusanenko at that point said he has a job, I am not worried about it. I am concerned about Mr. Tabakman.

I said fine. There was never any other discussion on it.

Q Did you also veto Mr. Finkel?

A I never considered his staying on in the public defender's office. I like

Mr. Finkel; Finkel in my opinion is a wonderful person. Had the president of the United States come to me and insisted that Mr. Finkel stay on as public defender, I probably would have vetoed Mr. Finkel in that situation. I feel bad that I have to say these things here, your Honor, but I am trying to tell you what I feel in my heart. [141]

Q Did anyone ever tell you that if you were going to be public defender you will have to fire Mr. Finkel or Mr. Tabakman?

A Never. No one ever told me that you are going to hire Mr. X or anybody else, no one ever said that to me.

Q I will show you a list of the former public defenders, the former staff. It is in with our papers to the court. Are there any names there which are Democrats which you didn't retain?

A Yes.

Q Can you tell us who they are?

A James Fitzgerald. Stuart Leudan. Aaron Finkel. That's it.

Q I will ask you what I hope is one final question. Your decision to hire,

terminate the assistant public defenders was primarily your decision based upon competence and integrity of the office which you wished to fill, is that correct?

A Yes, that is correct.

MR. SCHOENBERGER: Nothing further. [145]

*

Q With Manuel Sanchez?

A I don't know. I am sure you are not. Mr. Sanchez has indicated to me that.

Q With Barry Weiss?

A I believe Barry Weiss works for Mr. Wray and Judge Wray and Mr. Tabakman and Mr. Wagner.

MR. FINKEL: I have no further questions.

CROSS EXAMINATION

BY MR. WAGNER:

Q Mr. Branti, as one of the defenders you were present here during the testimony of Mr. Tabakman and Judge Wray when they referred to a certain conversation in the public, in the District Attorney's Office Christmas party. In fact you yourself alluded to it in passing?

A Yes.

Q That conversation did take place?

A No question.

Q Is it not a fact that at that time you told Mr. Tabakman in the presence of Mr. Wray that he would have to get a recommendation or a referral from a Democratic legislator to be considered by you for appointment to one of the six slots that were still open? [146]

A I believe at that time what I said was that I asked the Democratic caucus to compile a list of names. And that is his name should be on the list and I should consider it. He had already had, at that time prior to that, I believe this indication may have been on the 23rd, I don't recall when the party was, I had already spoken with Mr. Dusanenko about Mr. Tabakman.

Q What you told him in effect was that the other six appointments that you had not in your own mind decided on were going to come through the Democratic caucus and he would have to be referred by one of them to be considered by you?

A No. I said go get somebody to put you on a list of names that I will be

choosing from for the remaining portion.

Q Where did the list of names come from?

A Not from the Democratic caucus.

Q Maybe I misheard your testimony. Didn't I hear you just testify that you filled all but six spots and then the Democratic caucus came up with the recommendations for the other six?

A I don't believe it was the caucus. I talked to individual people about it. I was never at a caucus meeting. I have no idea of what was discussed. [147]

Q You have currently, if I am not mistaken, nine assistant public defenders?

A That is correct.

Q And of them John Allison came to you from the District Attorney's office where you had worked with him, and Mr. Costa I understand was a former assistant prosecutor with Mr. Nadjari?

A Yes. A former police officer who went to law school with me.

Q Mr. McAlevey was a holdover from the prior public defender; Mr. Nelson and Mr. Wayne Feinberg besides being a close

friend of yours was also a District Attorney?

A Yes.

Q By the way, there are three others in addition? By the way, you don't dispute the fact, do you, that these are all Democrats?

A No. I don't dispute it. I assume they are. I haven't checked the registration.

MR. SCHOENBERGER: With the exception, the registration is attached.

Q Mr. Sanchez was not registered.

John McCabe, do you recall who referred that name to you? [148]

A I believe I discussed him with the county attorney's office. He had applied for a job with the county attorney.

Q The county attorney is who?

A Marc Parris at this point.

Q Marc Parris gave you the name John McCabe?

A He asked me if I would consider him for the public defender's office.

Q In the process of your consideration did you discuss this with the Democratic legislators?

A No.

Q Gerald Blumenfeld, where did you obtain his name from?

A I knew Mr. Blumenfeld for a number of years. I believe his name was mentioned to me by Ms. Cornell.

Q The chairman of the Democratic party?

A Yes.

Q Laurna Bernard, you said you knew because she ran for family court judge?

A I believe she ran in a primary for that.

Q You have conceded, I believe without question that Mr. Tabakman and Finkel are competent attorneys and were properly performing the functions of their jobs at the time you took office, is that correct? [149]

A I think I said that I thought they were competent attorneys. I never made any indication on whether they were properly performing their functions as assistant public defenders.

Q Mr. Finkel has been an assistant public defender for some --

A Five years.

MR. FINKEL: Seven.

Q Do you know what John McCabe's criminal background is, how much criminal law he has practiced?

A He has had some limited criminal experience. He's a young man that I grew up with who I feel will move in. He has done a lot of appellate work on the civil end who I feel will move in and become my appellate man on the criminal end.

Q Gerald Blumenfeld, do you know what background he has in criminal law?

A I have had numerous cases with him in the Rockland County court. I talked about some cases that were pending.

Q How about Laurna Bernard, has she done extensive criminal work?

A Mrs. Bernard was a former Town Judge I believe, a number of years ago who had both civil and criminal cases before her at that time. [150]

Q Did any of these three to your knowledge handle anywhere near the volume of criminal cases that Mr. Finkel did in the seven years and Mr. Tabakman did in the 2-1/2 years he was in the public defender's office?

A I have no idea what their volume was. I am sure the number of cases could not compare.

Q Other than Mr. Tabakman, who you said was mentioned to you by Mr. Dusanenko, was the name of any other Republican suggested to you by anyone?

A I don't believe so.

Q You received 50 phone calls sponsoring people, about 50.

A Not sponsoring people.

Q Urging you to consider people?

A Not urging. I am talking about individuals. I said approximately 50 phone calls. I take that back. It's an exageration. I received numerous phone calls from attorneys that I met every day in the county court house asking for jobs.

Q It is your testimony that not one Republican except Mr. Tabakman was recommended to you by anyone?

A No. To be honest with you, sir, I expected that Mr. Grogan, who was voted the minority leader prior to my selection would be in touch with me to discuss any available attorneys he had. I never re- [151]

ceived any telephone call from him. Mr. Dusanenko sought me out and we discussed Mr. Tabakman. Mr. Grogan never called.

Q You admit that you did discuss your appointments with the 11 members of the Democratic caucus of the County legislature?

A Not with all 11 members.

Q But individuals?

A I never attended a caucus. I did discuss it with some Democratic legislators, that is correct.

Q You indicated that the only reason that you considered Mr. Sanchez qualified and Mr. Tabakman not was because Mr. Sanchez had announced his intention to sever his relationship with with the firm of Freedman, Wray, Wagner & Tabakman?

A With the firm of Freedman, Wray & Tabakman?

That was not my only reason for retaining Mr. Sanchez. I believe I indicated earlier that Mr. Sanchez was one of the individuals who would go to the wall in a local court, and excusing the expression, your Honor, would battle to the wall for the best possible plea, the best possible

defense that he could give his client. He had that reputation in the District Attorney's [152] office. That was a consideration.

Q Now, did you ever prior to the institution of this action discuss this impediment with Mr. Tabakman by virtue of the fact that his partner is a Town Justice, and offer him the opportunity of severing his partnership to remain as a deputy public defender?

A No, I didn't. I felt that that was Mr. Tabakman's responsibility to come to me.

I resented that he brought Judge Wray with him.

Q Just a minute, Mr. Branti. The party we are talking about was a party given by Mr. Kenneth Gribetz, the District Attorney of Rockland County, is that correct?

A That is correct.

Q Invited to that party besides the general public were the current public defender's staff which included Mr. Tabakman and Mr. Wray, and also Town Judges, correct, of which Mr. Wray was then?

A I believe, I don't know if that's how he got his invitation or not.

Q Why do you say that Mr. Wray brought Mr. Tabakman to you when they were both invited by Mr. Gribetz; in fact, you too were invited by him. [153]

A I didn't say that. I said he had Judge Wray with him when he spoke to me.

THE COURT: Just a second, gentlemen. Our reporter is tired to begin with. He can't write when you are talking as fast as you are. And when both of you are talking it goes out the window.

MR. WAGNER: I apologize, your Honor.

Q If Mr. Tabakman were to today sever his relationship with our law firm would you have any objection to retaining him as an assistant public defender?

A Probably.

Q What would that be?

A Mr. Tabakman is not going to fit in with what I had planned for the office.

Q You indicated that you were looking for suggestions for names, imput as you put it for the open six positions that you had not already filled. And you also indi-

cated that you had a final veto as to anybody that was selected, is that correct?

A Selected by who? I don't know what you mean.

Q All right. That any name that was put forward to you had a right to veto?

A That is correct.

Q Now, when you were appointed public defender who notified you of your [154] appointment?

A I believe Mrs. Cornell, I believe.

Q Did you have any discussions with the so-called Democratic caucus either prior to, I am sorry, strike that.

Did you have any discussions with the Democratic caucus, either the entire group or individual Democratic legislators prior to your appointment as public defender?

MR. SCHOENBERGER: Objection, your Honor.

THE COURT: Overruled.

A On what basis? I had conversations, yes. About what, I don't know.

Q You were actively seeking the job of public defender, is that correct?

A That is correct.

Q Were you ever asked by any of these legislators who agreed to support you whether you in turn would support certain names which they put forward as your appointees?

A Never. That's why I didn't think I was going to get the job, to be honest with you.

Q At no time did any Democratic legislators ever ask for any quid pro quo from you in return for their support? [155]

A No.

Q Now, how long have you practiced law in Rockland County?

A I was admitted to practice in '72.

Q At that time in '72 do you know whether Laurna Bernard who is one of your appointees was a partner in the firm of Prindel, Maidman, Windheim & Bernard?

A I believe that was the firm that she had been a partner in.

Q Were you aware of the fact that Mrs. Bernard whose partner Judge Robert Maidman is a co-equal judge with Wray who practiced in the Justice Courts in Rockland County?

A I am sorry, you will have to repeat the question.

MR. SCHOENBERGER: Objection. Objection as to its relevance, your Honor.

THE COURT: I am not sure of its relevance but I will overrule the objection.

THE WITNESS: Could I have the question read back?

(Record read.)

Q Were you aware of the fact, sir, that Mrs. Bernard, who is one of your appointees, was a partner in the law firm [156] of which Judge Robert Maidman was also a partner and Mrs. Bernard practiced criminal and civil law in Justice Courts in the County of Rockland, not of course before her own partner but in other Justice Courts?

A Yes.

Q At the time she was a member of the partnership, one of her partners was a Town Judge?

A I have no idea.

Q Would that make any difference in your mind with regard to her qualifications?

A Presently?

Q Yes.

A No. She is no longer a member of that firm.

Q Do you know a Judge Samuel Miller?

A Yes, I do.

Q Have you ever appeared before Judge Miller?

A Yes.

Q Do you consider Judge Miller to be ethical?

A I would assume he is ethical. I have never attempted to pass on anyone else's ethical qualifications but only what I see directly that affects me.

Q Do you know Rayfield Mertzel, Mayor of Haverstraw, also an attorney? [157]

A Judge Miller's partner, yes.

Q Do you know whether when they were partners Rayfield Merzell --

MR. SCHOENBERGER: Objection, your Honor.

THE COURT: I think this is going far afield.

MR. WAGNER: I will withdraw the question.

Q Mr. Branti, I show you Plaintiffs' Exhibit 7 in evidence, and it is your testimony and statement that the selections were actually made by the Democratic caucus composed of the parties?

MR. SCHOENBERGER: Objection. Your Honor, this is in evidence only to show that it was in the newspaper, not as to the truth contained therein. It can't be used on cross examination.

THE COURT: What rule of law are you drawing on for that interesting conclusion?

MR. SCHOENBERGER: This is only in evidence.

THE COURT: Overruled.

Q It is your testimony and statement that the selections were actually made by the Democratic caucus composed of the parties 11 county legislators, was completely incorrect?

A It is my testimony that the selections were actually made. That is not my [158] statement, No. 1. I had been interviewed for this particular article and again I told this particular newspaper reporter exactly what I said here. It is my testimony that that's not true; it is my testimony that I discussed each of these positions with various members who I assume were present at a Democratic caucus.

Q Various members of what?

A The Democratic party, and Mr. Desanenko, a member of the Republican party.

Q Did you appoint anybody who was recommended by Mr. Dusanenko?

A The only recommendation Mr. Dusanenko made was Mr. Tabakman.

MR. WAGNER: Nothing further, your Honor.

REDIRECT EXAMINATION

BY MR. SCHOENBERGER:

Q Earlier you spoke about Mr. Grogan. Is that the same Mr. Grogan who is a legislator for the Town of Clarkstown and the Republican minority leader?

A Yes.

Q Did he ever consult you or ask you to appoint anybody to the public defender's office. [159]

A No.

Q In your office, the public defender's office had you been giving your public defenders the ability to make broad determinations?

A Yes.

Q Had you been giving them the opportunity to make policy decisions?

A On individual cases, that is correct.

Q Do you feel that between you and your assistant public defenders, there must be a feeling of confidentiality?

A Absolutely.

Q Do you feel this would be a mainstay or a basic part of your office?

A Yes.

Q Do you feel that the relationship between you and your assistant public defenders is a confidential one?

A Certainly.

MR. SCHOENBERGER: Nothing further.

MR. WAGNER: I have nothing further, your Honor.

THE COURT: Thank you.* [20]

MR. GOODFRIEND: I never said that. If you want me to come back here Thursday afternoon or Thursday at 11 o'clock and if the Court directs me to be here, I am an attorney, I am an officer of this court and I will appear without subpoena.

MR. WAGNER: I would respectfully request that he be directed to remain and testify as long as he is here this afternoon.

THE COURT: I won't do that.

MR. FINKEL: May we fix a time

where we can have Mr. Goodfriend present?

THE COURT: Will you be here at 11 o'clock on Thursday, Mr. Goodfriend?

MR. GOODFRIEND: I prefer 2.

THE COURT: All right, 2:15 on Thrusday.

MR. GOODFRIEND: All right, sir, I will be here at 2:15 on Thursday.

MR. APOTHEKER: I would like to make clear to the Court that I would like the caption to be amended to so state exactly what the Court directed.

THE COURT: The caption will be amended so that the title of this case will be Aaron Frankel and Alan Tabakman, Plaintiffs, against Peter Branti as Public Defender, Rockland County, Defendant. [71]

Q Do you contribute to other political campaigns, Mr. Barone?

A I certainly do.

Q For example?

A I contributed to Mr. Jim Damiani's campaign this year.

Q He's a Democrat?

A He's a Democrat. I contributed to Mr. Ted Dusanenko's compaign.

Q He's a Republican?

A He's a Republican. And several others. I contribute to people I know and respect.

Q Without any coercion?

A No coercion.

Q If you didn't want to contribute to Mr. Goodfriend's campaign, did you have to?

A Absolutely not.

Q No one coerced you at any time?

A Absolutely not.

Q Mrs. Seigerman called you up and asked you whether you would like to contribute to Mr. Goodfriend's campaign?

A No, she didn't say that.

Q What did she say? [72]

A She said that Mr. Goodfriend had suggested that she make the call, and asked me if I would, and if I would ask those assistants whom I have just named if they would.

Q Any threat implied or expressed?

A Not one bit.

Q Mr. Barone, in your office as the public defender, you permitted your attorneys to practice?

A yes.

Q Was that a change from the prior administration?

A No.

Q They were always, even under Mr. Becker, permitted to practice?

A Yes. The reason being that it is a part-time office, Mr. Apotheker.

Q Did you ever have occasion to counsel Mr. Finkel on conflicts between his practice and his duties as assistant public defender?

A Yes, I counseled all my assistants, not only Mr. Finkel, as to possible conflicts.

Q Did you ever have to criticize Mr. Finkel for any possible conflicts he might have had?

A No. *

[77]

MR. APOTHEKER: I have no further questions at this time subject to recall.

REDIRECT EXAMINATION

BY MR. FINKEL:

Q Mr. Barone, did you hope at some time to be retained in office as Public Defender by the new Rockland County Legislature prior to the time you learned of its control by Democrats?

A Yes, I had assumed that if the election were to bring us a Republican legislature that I probably would be reappointed.

Q Did you think it would hurt your effort by contributing to the campaigns of various legislators?

A I contributed to their campaigns because they were friends of mine and because I respected them not for any other reason.

Q You didn't think that it would hurt?

A Quite honestly I didn't think it would help either.

Q When were you admitted to practice law in the State of New York?

A 1951.

MR. APOTHEKER: We have been through that and we have covered Mr. Barone's competency. [83]

H A R R I E T C O R N E L L, called as a witness, having been duly sworn, testified as follows:

MR. WAGNER: Do you have any objection if Mr. Burke sits in the jury box?

THE COURT: No.

MR. WAGNER: I have no objection.

MR. BURKE: I don't know if the record has reflected an appearance. I just appear to represent the witness, for that limited purpose, your Honor.

THE COURT: You have no standing so far as this lawsuit is concerned but you may sit there.

MR. BURKE: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. WAGNER:

Q Mrs. Cornell, do you presently hold any official political position in Rockland County?

A Yes, I do.

Q What is that position?

A Chairman of the Rockland County Democratic Committee.

Q For how long have you held that position?

A Since approximately June, 1972.

* [86]

Q Who presided at this meeting?

A I did.

Q Besides yourself and the members of the legislature who were present can you tell us who else was present?

A We had several such meetings. Generally speaking the legislators were present and the town chairmen were invited to attend and I was present.

Q The meeting that I am concerning myself with at this point is the meeting at which Mr. Peter Branti was designated to be the next Public Defender.

A I can't quite remember whether all of the town chairmen were present. I know that one town chairman had been ill for a couple of meetings. One was not able to attend for a vacation. It would be hard for me to specifically remember.

Q But, in other words, most of the legislators and some of the town chairman were present along with yourself?

A Yes.

THE COURT: How many town chairman are there?

THE WITNESS: There are five towns, five town chairmen.

Q Was the press present at the meeting?

A No. [88]

Q You say there were several meetings. Was there more than one meeting at which the appointment of the public defender was discussed, to your recollection?

A No. I don't think so.

Q I am confining my questions now then specifically to that meeting at which Mr. Branti's appointment was discussed, whenever it may have taken place. I don't think the time is of that much importance. It was sometime in the early part of December, was it not?

A Sometime in December.

Q At this meeting can you tell us who was proposed for public defender other than Mr. Branti, if anyone?

A I don't think anyone else was proposed by any of the legislators.

Q Do you recall who proposed Mr. Branti's name?

A I don't remember. I can only guess that it was one of the legislators from his own township.

Q What town is that?

A The Town of Haverstraw.

Q That would be then Mr. Rotella and Mr. Grant which are legislators from that town?

A Yes, that is correct. [93]

Q At the time of his nomination was there any discussion of assistant public defenders, the people that he would appoint to work under him?

A As to who he would appoint?

Q Yes.

A No, sir.

Q Was there any discussion as to the procedure by which he would appoint them?

A The only discussion that took place that night had to do with how recommendations would go to Mr. Branti from the Democratic caucus. [94]

Q How was it agreed that that would be done?

A It was agreed that it would be done by -- I may have to backtrack a little bit. Basically, it was agreed that the different town delegations would agree among themselves that evening, if possible,

how many numbers of recommendations they were permitted to make to both the County attorney's office and to both the public defender's office.

Q To backtrack for a moment, I take it that all of the people present at this meeting were all Democrats?

A Yes.

Q As it was considered by the Democratic caucus, was there an agreement that Mr. Branti had the right to refuse to accept recommendations by the caucus?

A It was mentioned by several legislators present. The question was raised, basically, and a number of legislators indicated that if Mr. Branti turned down their request, which everybody had acknowledged that he not only had the right but the responsibility to do in order to have an efficient office, a number of the legislators asked, from the different towns, asked if they might have the option of submitting different names of whoever Mr. Branti might have turned down. [95]

Q If a certain legislator proposed an individual was declined by Mr. Branti,

then that same legislator would have the right to propose another name?

A It wasn't so much that an individual legislator might. Basically, these recommendations were coming from the Town delegations. In a town that had six legislators presumably if recommendations from that town had been turned down by Mr. Branti, presumably those legislators would have an opportunity to meet again and discuss other names and then resubmit a name or names to Branti for his selection.

Q It was more or less agreed by the caucus that each Town delegation would have a certain amount of input both in the County attorney's and the public defender's office, is that correct?

A Yes, that's correct.

Q Each Township would get its share?

MR. APOTHEKER: Your Honor, I am going to object to that question.

THE COURT: Overruled. Do you understand that question?

A Would you put it to me, again?

Q I am talking now because you mentioned that assistant County attorneys

and assistant public defenders were treated, [96]
in essense, as a package, is that correct?

A We weren't talking especially about the public defender's office.

THE COURT: I cannot hear her answer if you start asking the next question.

MR. WAGNER: I am sorry.

THE COURT: Would you repeat the question before the witness.

(Testimony read.)

A We were not talking simply about the public defender's assistants or recommendations to that office. We were talking about attorneys for both the County attorney's office and the public defender's office. We knew that there were together in both offices that there were fourteen assistants, part-time assistants, that they were talking about. The towns wanted to make recommendations for these assistants and basically, the discussion that night was how should the recommendations come; how many recommendations should be permitted from each town.

Q To the best of your knowledge, were the names of any specific appointees discussed that night other than Mr. Branti himself?

A I do not think that the names for any of the assistants were discussed that [97]
evening.

Q Did there come a subsequent meeting when the various Town delegations did in fact submit names for consideration for the positions of assistant public defender?

A Yes.

Q That meeting, I assume, took place after the one in which Mr. Branti was appointed?

A Yes.

Q Did you also preside at that meeting?

A Yes.

Q Did that meeting, to the best of your recollection, take place some time around December 22nd or 23rd?

A Somewhere around that date. I would have guessed earlier in the week.

Q Were the same parties present as you mentioned as being present at the previous caucus?

A My recollection is about the same for all of these meetings, they had most of the legislators and some of the Town chairs.

Q This meeting was limited to Democratic personnel?

A Yes. [98]

Q Was Mr. Branti present at this meeting?

A No.

Q Did you again chair this meeting?

A Yes. I chaired it and I think Sam Coleman, who was to be the chairman of the legislature, he was there. They weren't always so very orderly and it wasn't like a formal kind of a meeting.

Q Were you chairing the meeting or in essence attempting to chair the meeting at the time that nominations were put in for assistant public defenders?

A Yes, I think probably.

Q Were names for assistant public defenders and names for assistant County attorneys considered together?

A Yes.

Q Could you tell us, if you would, please, how the names were put into consideration?

A The different Town delegations really proceeded to nominate people or to give their recommendations for these positions.

Q You say Mr. Branti was not present at this meeting?

A No, he wasn't.

Q Do you have any knowledge as to whether or not Mr. Branti had been presented with a list of these people for his approval prior to their submission? [99]

A Do I know whether he had?

Q Yes.

A No, I don't know whether he had.

Q Do you recall the names that were put forth that night for assistant public defender?

A Yes.

Q Was the name John Allison submitted?

A Yes.

Q Do you recall by what Town delegation?

A The Clarkstown delegation.

Q John Costa, by whom was he submitted?

THE COURT: Let's find out if he was submitted.

Q Was the name of John Costa submitted?

A Submitted for what, sir?

Q Submitted for the position of deputy public defender or assistant public defender?

A No.

Q John McAlevey, was his name submitted?

A Yes.

MR. APOTHEKER: I think Mrs. Cornell has characterized it as a recommendation. I think that word should be used. [100]

THE COURT: I read submission as meaning recommendation. I suggest you use recommended hereafter.

MR. WAGNER: Yes, your Honor.

Q Mr. McAlevey by the Ramapo delegation?

A I don't think I said, but he was.

Q Mrs. Cornell, were each of these recommendations made by the chairman of the delegation or were some made by individual members?

A Each Town delegation did have a chairman. The different Town delegations did not have chairmen of their delegations. They presumably had discussions among themselves prior to coming to the caucus.

Q Did one member of the Town delegation act as a spokesman for the Town delegation or did it vary according to the delegation?

MR. APOTHEKER: I object to that question. I don't see the relevance of that at all.

THE COURT: Overruled.

A I am not sure if I remember that or not.

Q Mr. William Nelson, was his name recommended?

A Yes.

Q By which delegation, do you recall?

A Clarkstown. [101]

Q Manuel Sanchez, was he recommended?

A No. I don't believe so.

Q Wayne Feinberg, was he recommended?

A Yes, he was recommended.

Q By what delegation, do you recall?

A Stony Point, I believe.

Q You know who recommended him because that is a one-man delegation, right?

A Right.

Q Mr. John McCabe, was he recommended?

A Yes.

Q By what delegation was he recommended?

A Also by Stony Point.

Q Was Gerald Blumenfeld recommended?

A Yes.

Q By what delegation?

A He was recommended by me.

Q How long have you known Mr. Blumenfeld?

A Approximately four years.

Q Did you have any discussions with Mr. Branti or anyone else prior to your recommendation of him?

A I did not have any discussion with Mr. Branti.

Q Did you have any discussions with anyone before you made your recommendation? [102]

A I had indicated to certain of the legislators, I think--let me think for a minute.

(Pause)

A (Continuing) I think I had indicated to some of the legislators that I was going to recommend his name. [103]

Q There must have come a time in your mind when you yourself decided that he was worthy of being proposed as an Assistant Public Defender?

A The caucus before was when the discussion took place, if I remember correctly, about Mr. Blumenfeld.

Q What discussion took place at that time concerning Mr. Blumenfeld?

A We discussed the fact that there

had been -- basically the different towns were going to make recommendations. You recall that I discussed that with you.

Q Right.

A At that point before we really got into deciding how the different towns would make their recommendations or how many recommendations they would be able to make I asked because I wanted to nominate Mr. Blumenfeld's name as being someone that I recommended very highly and I wanted it looked upon as not coming from any particular town.

Q This is what you might call a county chairman's prerogative?

A The county chairman in Rockland doesn't have any prerogative.

Q Courtesy?

A No, it wasn't even that.

THE COURT: I would appreciate it, Mr. Wagner, if you let her finish her answer. [104]

MR. WAGNER: I apologize.

A No. It wasn't a courtesy at all. I was really submitting his name because I felt that he had been the law chairman for the County Democratic Committee; he was very diligent, hard working; besides being a

lawyer he was a CPA. I thought he was well qualified and I was submitting him to the whole caucus for their approval, but I felt that he couldn't really -- I was dubious as to whether he would be recommended by a particular township. What I wanted was for the caucus to agree that perhaps he could be one of the recommendations that the caucus would submit to Mr. Branti and after that they could submit other recommendations on a town basis.

Q You said that you were afraid that his name might not be submitted by one of the town delegations?

A Yes.

Q If his name had not been submitted by one of the town delegations then, I assume, that he would not have had a chance to get that nomination.

MR. APOTHEKER: I object.

THE COURT: Overruled.

A Repeat that, please.

(Question read.) [105]

A He might not have been recommended. He might not then have been recommended by one of the town delegations.

Q My question was if a person was not recommended by a town delegation then that person was not in the running for an appointment, is that correct?

A That would not be correct. I am sure he would have been free to submit his application directly to Mr. Branti.

Q Are you familiar, Mrs. Cornell, in a general way with the duties of an Assistant Public Defender?

A I am a little bit now.

Q Were you at the time that you decided to submit Mr. Blumenfeld's name?

A I think so.

Q What was your understanding of the duties of an Assistant Public Defender or was your understanding of those duties at the time you decided to propose Mr. Blumenfeld?

A I knew that the Assistant Public Defenders often had to go to Justice Court in the evenings. A great deal of it was evening work.* [111]

Q Once the various --

THE COURT: Did you mean that question the way you asked it?

(Question read)

THE COURT: You meant to exclude Mr. Finkel?

MR. WAGNER: No, at the time this took place Mr. Finkel was still on the job. His replacement was not to take place until January, '78. I will limit my question.

Q Was there a discussion of any of the other incumbent Assistant Public Defenders, whether they should be kept on?

A No, I don't believe there was any discussion.

Q Mrs. Cornell, after the names had been recommended to the caucus as a whole did the caucus then vote on the names?

A No.

Q What then was the next procedure to bring about the official appointment of these people, the submission of the names to Mr. Branti?

A Yes, for his approval.

Q And who was charged with submitting the names to Mr. Branti, was that yourself? [112]

A I did, yes.

Q Did you subsequently have a meeting with Mr. Branti?

A No, I did not.

Q How did Mr. Branti obtain the recommendations of the caucus from you?

A I called him on the telephone.

Q You read him the names?

A Yes, I told him that there were certain names that were being recommended. He had already told me in a prior telephone conversation the day that I told him that he was being named Public Defender that he had the right to make final decisions and if anybody was unsatisfactory or not -- that he didn't feel could do the work in his office that he would not accept that and that was fully understood and completely acceptable. But I gave him or told him those names that I did have of people who were being recommended by the caucus.

Q Did he have any comment with regard to any of the names?

A He did have a couple of comments, yes. He did have a couple of comments.

* [117]

Q Would you consider yourself an expert on Rockland County politics?

MR. APOTHEKER: I don't think anybody can be considered an expert on Rockland County politics. I don't think there are such qualifications.

THE COURT: That may be. Maybe Ms. Cornell can give an opinion.

A People active in Rockland County politics know that it is an unusual, perhaps a somewhat unusual situation. Many other counties don't understand this, many other places. Because of the type of government we have with a legislature and no county executive and the legislators elected on a townwide basis the town Democratic Committees function as rather autonomous groups. The County Democratic Committee serves in a sense kind of an in a way mediating or chairing a position. It is quite unlike that of other political bodies or other counties. [118]

Q You have grown in this system since 1960 to the point where you are now the highest Democratic County official in the County, is that correct?

A Well, I had done all sorts of political activities in those first few

years that were not very -- that were not leadership activities.

Q I repeat my original question. Would you consider yourself to be an expert in Rockland County politics?

A Well, I am not sure I consider myself an expert at anything but I guess I probably know quite a bit about it.

Q Would you, based upon your long experience in Rockland County politics, would you characterize the appointments of the assistant public defenders as political appointments, political patronage?

A From the standpoint of the caucus and the political party there were numerous positions that were vacant and we felt that we certainly ought to have the ability to make recommendations and have input for these positions and that was the spirit in which these recommendations were made.

* [120]

Do. I understand that after the Democratic caucus had decided that Mr. Branti would be the public defender that you notified him of that choice?

THE WITNESS: Yes, I did, the next day.

THE COURT: Was it at that time or was there at that time a discussion of the appointment of assistant public defenders?

THE WITNESS: Yes, there was.

THE COURT: Would you tell me what that complete conversation was? I wanted the complete conversation, in substance, that you had with Mr. Branti immediately after the Democratic caucus had decided that he was to be public defender.

THE WITNESS: I called him the next day basically to inform him that he had been so selected and to congratulate him and we had -- he was very pleased about that. I then brought to his attention the fact, which I am sure he didn't need me to bring it to his attention, but since he had been an assistant district attorney I wanted to call to his attention specifically the fact that there were certain cases that he might be able to legitimately and properly handle as public defender and that I thought for his benefit he should look very carefully into that area to be sure that he knew what his [121] office could handle and could not handle in terms of cases that had been in the dis-

trict attorney's office. He said that he certainly would because he wanted everything to be proper as he took office as public defender.

He then said to me that he wanted me to understand that he felt that he had to make the decisions as to who would be appropriate in his office and who would have the right qualifications and he would be happy to accept recommendations from the Democratic caucus but so long as I understand that. And I said I certainly did and that there was no question otherwise, that we expected him to exercise that right of his and responsibility.

THE COURT: Did you have any discussion of how the recommendations would be channeled to him?

THE WITNESS: Well, I don't really remember. I may have told him that there would be further discussions at the next Democratic caucus and that I would be in touch with him.

THE COURT: Did you have any discussion with respect to the Democratic caucus or you as County chairman have any sort of corresponding veto over his choices? [122]

THE WITNESS: Did we have any such discussion?

THE COURT: Yes.

THE WITNESS: There was no such discussion and there was no question of that after he indicated to me that he felt that he had to have the final decision. I agreed with him.

THE COURT: Did he tell you that he had chosen some people already and that there were X or X minus 1 or any number of positions that were presently available?

THE WITNESS: No, I don't think he said anything about that and I don't think we discussed any individual names.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MR. APOTHEKER:

Q You have gone into detail about the conversation you had with Mr. Branti, Mrs. Cornell. Am I right in assuming that you at no time told him he would have to appoint any of the individuals that you recommended from the Democratic caucus?

A No, sir, I never told him that.

Q Do you know either of the plain-

tiffs, Alan Tabakman or Aaron Finkel?

A No, I don't. [126]

*

Q Do you know the term of the office of the public defender, his term of office?

A Yes.

Q What is it?

A Six years.

Q The people that he appoints as his assistants, how long do they serve?

A It was my understanding they serve at the public defender's will and pleasure.

Q You were aware, were you not, at the end of Mr. Barone's term the positions in his office would be vacant, is that correct?

MR. WAGNER: Objection, your Honor. I believe that is what this whole lawsuit is about.

THE COURT: He is asking for her understanding of the situation.

MR. WAGNER: Then I withdraw my objection.

A That was my impression, yes.

Q You felt you were not necessarily replacing anyone -- not you were replacing anyone -- but Mr. Branti was not necessarily replacing someone but were making recommendations

to appoint new people to vacant positions, is that correct? [127]

A Yes. That was my impression.

Q How long have you known Gerald Blumenfeld?

A About four years, I think.

Q Have you known him to be a competent and qualified attorney at bar?

A Yes.

Q Have you ever had any question about his ethics or moral character?

A No.

Q Did you see him as absolutely qualified to be an assistant public defender?

MR. WAGNER: Objection. The witness said she was only generally familiar with the duties of a public defender.

THE COURT: This answer is called for within the framework of her previous testimony.

(Question read)

A yes, I did.

Q Was your testimony that you didn't nominate or any one of the democratic caucus did not nominate, but they recommended, is that correct?

A Mr. Branti?

Q Yes.

A Yes. That's correct. [128]

Q Did you know Aaron Finkel's party registration? Did you know during the time from November to January of 1977 of Mr. Finkel's registration?

A No.

THE COURT: She said she didn't know Mr. Finkel. I take it that means you didn't know his party registration?

THE WITNESS: I don't think I did, your Honor. I am still not sure I know what it is.

Q Was Mr. Finkel ever discussed by the democratic caucus?

A No. I don't believe so.

Q Did you say that Mr. Finkel would have to go?

A No. Mr. Finkel was never discussed at any caucus, as far as I know.

Q What about Mr. Tabakman? Did anyone say at any caucus including yourself that Mr. Tabakman could not be reappointed?

A No.

Q Was his name discussed?

A No.

Q Did any democratic legislator or town chairman ever ask you about Mr. Tabakman and whether he could maintain his position? [129]

A No.

Q Did Legislator Dusanenko ever call you on behalf of Mr. Tabakman?

A No.

Q Did a non-democrat ever call you to see if they could be appointed as an assistant public defender, to the best of your knowledge?

A yes.

Q Who was that?

A Mr. Barone.

Q Mr. Branti was never at a caucus; is that right?

A That's right.

MR. APOTHEKER: May I have a moment, your Honor?

(Pause)

MR. APOTHEKER: I have no further questions at this time.

MR. WAGNER: I have no further questions.

THE COURT: I have a few more.

*

[133]

*

Q Do you mean as a candidate or as an endorsement?

A As a candidate.

MR. APOTHEKER: Up until now I haven't objected that much. I fail to see the relevance of Mr. Barone who is not a party to this action and what relevance any conversations either the caucus or Mrs. Cornell had about Mr. Barone.

THE COURT: You really see no relevance at all to that?

MR. APOTHEKER: No.

THE COURT: I do so I will overrule your objection.

BY THE COURT:

Q Was there any discussion at the time you passed a long his application of the fact that he was a republican and hence not eligible?

A No, sir.

THE COURT: Are there any further questions? Mr. Apotheker?

MR. APOTHEKER: No. [153]

Q Was it, to your recollection, was it not common knowledge among Democratic circles that Mr. McAlevey had made it a point that he was going to maintain Mr. Barone on as an Assistant Public Defender if he did get the nomination?

A That is possible, yes.

Q Didn't you in fact tell him that one of the reasons that his attempt to get the nomination of Public Defender was in trouble was because of his insistence on appointing Mr. Barone?

A I said that in my opinion one of the problems and I stated this before, the first priority that the Ramapo legislators had was to select a chairman from Ramapo. The other problem was the fact that he may have had a problem because of this so-called -- I was not part of any agreement or any deal or anything else that came up. It was knowledge that there may have been some kind of agreement that he would have kept Frank Barone on.

Q Mr. Gorman, were you present at a Democratic caucus at which the recommendation of Assistant Public Defenders was made some time in the latter part of December?

A As far as names were concerned?

Q Yes.

A I don't believe so. [154]

Q Were you at a Democratic caucus at which Mr. Peter Branti was designated Public Defender?

A Yes.

Q At that caucus were any names put forth as Assistant Public Defenders -- well, were any names put forward?

A I don't remember any names coming forward.

Q To the best of your recollection, at that caucus was any understanding arrived at as to how the Assistant Public Defenders would be chosen?

A To the best of my knowledge I remember that the Public Defender's position and also the County Attorney's position were treated as one. There was some sort of a setup there or an agreement they came to that X amount of attorneys, I will use the word attorneys, would come from each township. The only thing that I do remember is that there were a number of attorneys that were supposed to come from the town of Ramapo or recommended from the town of Ramapo.

Q Were you as the town chairman of the town of Ramapo advised as to the number of appointments that you have?

A I had no appointments.

Q The town would have, not you personally.

MR. APOTHEKER: I object to that question. I don't believe the town has any [155] appointments and there was not any testimony that they did.

THE COURT: I am not really sure what the question is at this point.

(Question read)

MR. WAGNER: By you I mean the town of Ramapo.

MR. APOTHEKER: Same objection.

THE COURT: I thought you said you had no objection.

MR. APOTHEKER: I thought I did say I had an objection because there has been no testimony that the town of Ramapo had any appointments.

THE COURT: I will sustain the objection.

Q Mr. Gorman, in the parceling out of the attorneys' jobs, i.e., Assistant County Attorney and Assistant Public Defender, were any number of these jobs alloted to the Ramapo delegation?

MR. APOTHEKER: I object to the use of the words parceling out and allotting to.

THE COURT: You want him to use recommended.

Q Allotted to Ramapo to recommend, I will put it that way.

A The legislators from Ramapo, to the best of my knowledge, it was suggested that they can or they should recommend at [156] least six attorneys.

Q And that was six altogether for both offices, Public Defender and County Attorney?

A Right.

Q Mr. Gorman, Mr. Frank Barone is a resident of the town of Ramapo, is that correct?

A I don't know.

Q Were you present at a caucus when the county chairman, HarrietCornell, brought up the name of Frank Barone as possibly being kept on in the Public Defender's office?

MR. APOTHEKER: Objection, your Honor, hearsay.

THE COURT: Overruled.

(Question read)

A I may have been there. I believe I might have been there.

Q And what was the reaction of the

delegation to that suggestion regarding Mr. Barone?

A They did not look upon Mr. Barone's actions, one who had criticized the District Attorney, as very good.

Q And Mr. Barone is a Republican, right?

A I don't believe that that question that he was a Republican ever entered into it.* [161]

*

Meehan-direct

Q Were you party to any conversations prior to that meeting at which it was determined that only the name Mr. Branti would be put in?

A There were some discussions. It is very difficult to recollect. I guess I would have to say — Could you repeat the question?

(The question was read back.)

A Yes.

Q Could you tell us what the gist of those conversations were; how it was determined that only Mr. Branti would be nominated and, therefore, appointed?

A I think it's important to consider the background. I would like to talk about that.

MR. WAGNER: I have no objection, if the Court has none.

A Rockland County is run by a part-

time legislature. I have a regular, full-time job, and most of the other members do, as well. Most unlike other counties, like Nassau and Suffolk; those appointments were made by the county executive. These appoitments are made by the full legislature, namely, eighteen people. Discussions have to take place. You have to have some type of an agreement on that.

I represent the Town of Ramapo. We have six legislators. They were all [162] Democrats. We are 6/11's, a majority of the eleven Democratic members. We were, naturally, interested in having significant influence in county government and to do this, there are a number of major posts that are appointed by the legislature. We were interested in gaining some of those positions. Naturally, it's a give and take process.

We were interested in gaining the chairmanship of the legislature. We were also interested in having the clerk to the legislature, who had previously been an appointment from Ramapo, re-appointed.

The other major position would be the county attorney and I can't think of anything too major after that.

Ramapo felt that they wanted the chairmanship and that they wanted the clerk to the legislature. Because of that, I think you would agree, that it would be fairly unfair for Ramapo to want anything more.

We also had an agreement among ourselves and the caucus that rather than just have a simple majority to make those determinations, that a majority of eight would be needed.

Q This was a majority of eight of the Democratic eleven? [163]

A Yes, exactly.

Q Was the Republican minority consulted in any way with regard to these appointments?

A I think it is usual -- I might add that I hold two degrees in Political Science. I think those of us involved in politics, as you, yourself, are, from being a candidate -- I don't remember the Republicans, when they controlled the legislature, calling in Democrats.

In the U.S. House, they have a caucus room for the Democrats and a caucus

room for the Republicans. It would be pretty rare to find a Republican in a Democratic caucus room, and a Democrat in a Republican caucus room.

THE COURT: I take it the answer to the question is no?

THE WITNESS: Yes, your Honor.

Q In other words, Mr. Meehan, when the Republicans had the power, they appointed their people; and when the Democrats took the power, they appointed theirs; is that correct?

A I would say generally speaking, four years ago, we had thepower; and there was a vacancy in the Department of Audit and Control, and we had four returning incumbent Demo- [164]
crats coming back, and they said the Republican incumbent to that position was excellent; and that was George Renc. We appointed him, although he was then and is now a registered Republican.

Q You mentioned that Mr. McAlevey, his name was also being considered, along with Mr. Branti, originally?

A I am saying that back in several months' time, that I had heard that Mr. McAlevey was interested in becoming the Public Defender of Rockland County. He was not discussed by the caucus.

Q Mr. McAlevey is from your own Town of Ramapo; is that correct?

A Yes. He is a former supervisor.

Q Did Mr. McAlevey ever approach you or any of the other Democrat legislators from Ramapo, and ask you to consider his name?

MR. APOTHEKER: I object to that question.

THE COURT: I will sustain the objection.

Q Do you know of your own knowledge --

THE COURT: The word is "Democratic."

MR. WAGNER: If that is the only objection --

MR. APOTHEKER: It's not my only objection. [168]

Q Subsequent to the appointment of Mr. Branti's designation by the Democratic caucus which was taken tantamount to the appointment, was there any discussion among the county legislators, the Democratic county legislators as to the method to be followed with regard to Mr. Branti's assistants, how they were to be chosen?

A Mr. Branti's assistants were to be chosen by Mr. Branti.

Q Were you present at a Democratic caucus at which certain names were submitted by various town delegations for Mr. Branti's consideration?

A Let me say I think that certain names were submitted for his consideration, but I don't know that it was done at a caucus, per se. It might have been done at a later date or by phone.

Q If you call it a caucus or a meeting, were you present when names of certain individuals were discussed as being recommended to Mr. Branti by the 11 Democratic legislators?

A I had heard in discussions with my own delegation, that is the six members from Ramapo, I do remember them suggesting some names to be recommended to the Public Defender for appointments. [173]

*

MR. WAGNER: No further questions, your Honor.

CROSS EXAMINATION

BY MR. APOTHEKER:

Q Could you for the court's edification briefly describe the governmental and political makeup of the County of Rockland as to the towns and how many people are elected from each town?

A Rockland County is composed of five towns of varying populations. In the late 1960s after the famous apportionment cases -- I guess the first one was Baker v. Clark -- a suit was brought and Rockland County was mandated to have a one man, one vote system. The County Board of Supervisors, one supervisor of each town at that time comprised the county government. They made a proposal for having a county document on a weighted voting system, is my recollection. That was ruled improper by the courts. I believe the Supreme Court actually determined Rockland County's apportionment. The method was to take the population of our smallest town, which is Stony Point, and divide that population into the population of the other four towns in the county. What came out was an 18-member legislature: Stony Point having one representative, Haverstraw two, [174]

Orangetown 2, Clarkstown five and Ramapo six. In 1969, people of Rockland County selected a Republican legislature; 14 Republicans and 4 Democrats. In 1973 there was another election and it flipped: 14 Democrats and 4 Republicans. In 1977 another election was held and at the same time an election was held a proposition was placed on the ballot because many of us felt there was a lack of continuity in county government and we felt there were problems with ballots crowding when you were asked to vote for 6 out of 13 people.

We thought we would adopt a staggered term system. At the time what was determined which passed as a referendum is that the three in my town who were the highest vote getters would get four terms and the next two years. I was elected to a four-year term. In other regards, I think it is very important to know although I consider it rather irrational myself that Rockland County has no chief executive. We have one hundred thirty three million dollar business. We have non-full-time running the store. I think most people would agree if you have a million

dollar store you have someone in charge of it full-time. That is not the case in Rockland County. It is run in my evenings and lunch hours and Sundays and Saturdays. [175]

MR. WAGNER: I have no particular objection to the witness' testimony if your Honor has none. I think it may be getting irrelevant.

THE COURT: I will hear it.

MR. WAGNER: I have no objection.

THE WITNESS: The chairman of the legislature for purposes of assigning federal grants and making contracts with private agencies is a chief executive officer. In reality, he is just another member of the legislature and he doesn't really make any important decisions on his own. He simply acts at the behest of the other members of the legislature. Of course, we have five towns and five supervisors and the politics of Rockland County are the politics of the various towns. Each town selects a certain number of legislators to run for office for that particular time. In my town, for instance, you can vote for any six. In Clarkstown you vote for any five.

It is a very, very decentralized situation. I read in the newspapers about places like Nassau County where the county chairman there has a salary of $50,000. Our county chairman has a salary of zero, makes no money and has almost no power. The public officials in Rockland County are never controlled by the party officials as might be the case in other jurisdictions in the country. [176]

Q Mr. Meehan, how much do you make as a part-time county legislator?

A $8,000.

Q The chairman?

A $11,000.

Q In order to have anything pass the legislature you need a majority vote?

A Yes.

Q In order for a contract to be executed by the chairman he needs powers to do that from the legislature itself?

A That's correct.

Q How do you view your responsibility as an elected official with regard to the recommendations to be made on governmental jobs?

A The overwhelming number of positions

in Rockland County are under Civil Service. It is a list system and people take tests, that type of thing. There are a number of discretionary positions like the Public Defender or County Attorney. I feel I have a responsibility as an elected official of part of the county to its largest town to select the best possible people for those positions. This is what I constantly try to do. I might say I feel it is very im- [177]
portant that they be qualified and the qualifications would probably be the primary thing. If a Public Defender does a poor job or if a County Attorney does a poor job or the Clerk to the legislature does a poor job or if the head of the department of audit and control or any other person I make a poor judgment on, it reflects on me. They scream to me. I get called at 7 o'clock Sunday morning or I get called late in the evening. I am responsible. [178]

Q And do you view that responsibility to theAssistant Public Defenders or Assistant County Attorneys and your input into those recommendations?

A If the County Attorney -- we can have the most brilliant County Attorney and if

he does not have good assistants it is going to be a poor office because the majority of the work will be done by assistants. I think it is important who the assistants are.

Q It is important for you as an elected official to have some influence into the recommendations to be made to that position?

A That is correct.

Q Mr. Meehan, I show you Plaintiffs' Exhibit 13, the legislative meeting transcript. Showing you Resolution 20 of 1078 authorizing the appointment of Assistant Public Defenders. Could you just read the resolve clause.

A "Resolved that the Public Defender be and is hereby authorized to appoint those Assistant Public Defenders as provided in the 1978 budget whose salaries shall be fixed in accordance with Resolution 162 of 1972 as amended and Resolution 895 of 1977."

Q I call your attention to the remarks made by Mr. Coleman, and I show them to you on the unnumbered page and ask you to review [179]
them for a second at the bottom of the page.

I don't know whether you were present at the time Mr. Coleman made that --

A Yes, I was.

Q Did you believe Mr. Coleman to mean by that statement that every single political appointment including those of the Assistant Public Defenders that were recommended by the Democratic caucus and I will vote for them or did you believe him to mean the major political appointments of the County Attorney and the Public Defender?

MR. WAGNER: Objection.

THE COURT: Sustained.

Q Do you know Mr. Aaron Finkel?

A Yes.

Q How well do you know him?

A Not very well.

Q Have you ever had a conversation with Mr. Finkel regarding his membership or affiliation with the Democratic Party in Rockland County?

A No.

Q Did you ever ask him to join the Democratic Party in Rockland County? [180]

A No.

Q Contribute money to the Democratic Party in Rockland County?

A No.

Q Swear allegiance to the Democratic Party in Rockland County?

A No.

Q Do you know Mr. Tabakman?

A Is Mr. Tabakman the gentleman seated to the left of Mr. Wagner?

Q I take it you don't know him. He is the gentleman seated to the left of Mr. Wagner.

A As a public official I literally meet thousands of people and I may have shaken Mr. Tabakman's hand on one or two occasions. I don't remember seeing Mr. Tabakman.

Q Mr. Meehan, there was a meeting in executive session, I believe, on January 1, 1978, New Year's day and I believe, or tell me if I am correct, that it was the new legislators that were going to be sworn in on January 3rd that had that meeting?

A Yes. In fact, I think the law said that they were automatically legislators and they had all been sworn in prior to that. It was not only an executive meeting it was also [181] a public meeting. In other words, we voted

ourselves into executive session and then we voted ourselves out of it and passes resolutions. We can't pass resolutions in executive session.

Q Did you have occasion to speak to any of the Republican minority members of the legislature at that time?

A On that day, yes, after the meeting.

Q Could you tell us who you had a discussion with and what was the discussion about?

A Yes. Mr. Coleman, as the chairman, and myself as majority leader, were asked to have a conversation with Mr. Dusanenko and Mr. Murphy and Mr. Bernstein.

Q All Republican members?

A That is correct, yes. In the discussion they were concerned about a number of things. They felt that although the seven Republican members weren't the majority, they were certainly a significant part and they felt that they should be able to take part in appointments that the legislature was going to make and that there should be Republican appointees and that we should share the appointing with the Repub-

licans and they were also specifically concerned about Mr. Finkel and Mr. Tabakman, and also about the future, what would be the posture of the Democratic majority in the future. [182]

Q What other conversations took place along that vein?

A Well, we had responsibility for about ten minutes but I think that the crux of the situation was that they said that -- expecially Mr. Murphy and Mr. Dusanenko, they had been a colleague of Mr. Coleman for four years and that they did not want to vote against his nomination and at the meeting on the 3rd they were prepared to vote for his nomination I think if we were willing to possibly say that Mr. Tabakman and Mr. Finkel could stay in the Public Defender's office or if there was a commitment on behalf of the Democratic majority that they would -- that the Republicans would be able to share in the appointing at least in proportion to the number of the legislature. They asked us to go back to the other Democratic members and propose that to them and I said -- Mr. Coleman and I both said we would do that. I said that I felt that in

regard to Mr. Finkel and Mr. Tabakman that Mr. Branti had already made his selections as to who would be appointed Assistant Public Defenders but that we would bring the message back and we agreed that they were a significant portion of the legislature and -- as far as nonpolitical, nonconfidential type of appointments that they should share in this. And they wanted some [183]
type of commitment by January 3rd which was our organizational meeting and I said it was snowing like mad that day and we were not prepared to have a meeting of the Democrats that evening nor were we going to have a meeting the following day nor were we going to have a meeting Tuesday so I could not make any type of commitment like that prior to the meeting Tuesday, January 3rd. [184]

Q Did you ever respond to the offer of the Republican offer on the evening of January 3? Was there a response to the offer?

A Well, on the meeting of January 3 - - Let me explain how the legislature works, and this is important. In order for us to appoint a Public Defender, there must be a recommendation by the appropriate committee

of the legislature. In this case, that is the multi-services committee of the legislature. If that does not take place, then a member must ask for a waiver of the rules of the legislature.

And in order for there to be a waiver of the rules for going to committee, you have to have twelve votes. We Democrats only had eleven, so that I was going to ask then or ask the Republicans to go along with the waiver of the rules on Mr. Branti's appointment. If this was not possible, then we would have to have a special meeting of the multi-services committee that evening and we had had a short executive session prior to the meeting of the legislature, and then the Republicans asked to have a brief meeting of the seven Republicans. And I asked them, "Would you go along with voting for a waiver of the rules on Mr. Branti, or will you go along" -- I don't know if I said "waiver of the rules," but, "Will you go [185]
along with Branti, so we don't have to stop the legislature in midstream and have a meeting of the multi-services committee?"

They said that they would not. And so, we did have to have that brief meeting of the multi-services committee, so that Mr. Branti could be designated by the multi-services committee and the chairman of the multi-services committee could report to the chairman that he had been appointed and nominated.

Q Was there ever a response to the minority's offer on January 1st?

A I think it's more like a request; yes. There really has not, because we haven't, since that time, met; although we did call one meeting. We didn't have enough Democrats to get a full discussion of that particular issue. But I have promised them that I would and I will bring that up when I have all my eleven Democrats in one place.

MR. APOTHEKER: No further questions, your Honor.

* [270]

Mr. Goodfriend was a Democratic legislator and I think there is something here that may be improper, to call in a previous Republican legislator to perhaps impeach one of their own witnesses, a previous democratic legislator.

It is the tenure of that aspect of this course of the trial which I find disturbing.

THE COURT: Well, you will have an opportunity to cross-examine Mr. Mascola, and I don't know at this point what Mr. Mascola, is going to testify to, but you will have an opportunity to cross-examine him.

While Mr. Goodfriend testified, was called as a witness by the plaintiffs, I don't think there is any question but that he was not a friendly witness. You heard his testimony. I would say he was not a friendly witness, and I certainly am not going to regard the plaintiffs as being bound by his testimony. So if this is an objection to the examination of Mr. Mascola it is overruled. If you are attempting to bring to my attention a possible bias or prejudice on the part of Mr. Mascola, why, that is something you can develop on cross-examination.

* [273]

Q Did there come a time when you specifically requested Mr. Goodfriend to do

whatever he could to keep Mr. Tabakman and Mr. Sanchez in that office?

A I asked Mr. Goodfriend to do what he could do to keep Mr. Tabakman and Mr. Sanchez in office.

Q And what response did you receive from Mr. Goodfriend to that request?

A He agreed that these people were competent, they were qualified, they were experienced, and that they should be kept in office, but he said he thought it would be extremely difficult, he didn't know that he could do anything at this time. He implied that the die was cast or something.

THE COURT: Did he say that the die was cast?

THE WITNESS: Sir, I don't remember exactly. Die was cast, or whatever was done was complete. It was extremely difficult for him to move, but he would look into it.

Q Did he make any other suggestions with regard to any other avenues you might pursue? [274]

A Yes. He suggested that I contact a James Damiani, who was a legislator from Clarkstown. Both Mr. Tabakman and Mr.

Sanchez are residents of Clarkstown.

Q Did he say to you that that was the reason you should contact the Clarkstown representative?

A He said that he felt that Mr. Damiani probably could do more for these two assistant public defenders because they were in his area, and that he had some sort of, at least the Ramapo group and the Clarkstown group had some sort of a quota or they could sponsor certain people. [275]

Q Mr. Mascola, did Mr. Goodfriend say anything to you at that time regarding any conflict between Mr. Tabakman and his law partner, Judge Wray, that he could not service because of that reason?

A In the course of the conversation I mentioned that Mr. Sanchez was not in any way affilitated with any particular party. He was not a Republican or Demcorat. He was an Independent.

I also mentioned that Mr. Sanchez had volunteered his services for a period of six months in order to learn and go through, I guess, an apprenticeship program and that he should be given consideration as well as Mr. Tabakman.

He said, well, possibly something could be done for Sanchez, but they couldn't do very much for Tabakman because he was an active Republican; not only was he a member of the Republican Party, but he was active in the past campaign.

Q Did Mr. Goodfriend say anything to you with regard to there being any impropriety in a judge's partner serving as an Assistant Public Defender?

A I don't recall that as part of the conversation.

Q Did there come a time -- I'm sorry, strike that.

After your conversation with Mr. Goodfriend, did you in fact consult with [276] Mr. Damiani?

A Yes, I did.

Q Could you tell us, did you meet with him personally or was this a telephone conversation?

A I did not meet with him personally. It was a telephone conversation.

Q Would you tell us what the gist of this conversation was, please?

A Again, I requested or asked assistance from Mr. Damiani in behalf of Mr. Tabakman and Mr. Sanchez; asked if he would help these people keep the jobs that they had for the past couple of years, and Jim Damiani said he had already made his two appointments. Evidently he was allotted two appointments and he had made these appointments and it would be extremely difficult at this time to consider reappointing Mr. Tabakman and Mr. Sanchez.

Q Did Mr. Damiani say anything to you concerning any impropriety in Mr. Tabakman as a partner of the town justice serving as Assistant Public Defender?

A This was not part of our conversation.

Q After you spoke to Mr. Damiani, did you speak to or meet with anyone else whom you felt might be in a position to help Mr. Tabakman and Mr. Sanchez?

A Yes, I had an opportunity to meet personally with Marilyn Troy. Marilyn Troy [277] is the chairman of the Clarkstown Democratic Committee.

Q Would you tell us the gist of your conversation with Marilyn Troy?

A I again asked Marilyn for some help. I believe that both men were deserving of her consideration. She recognized the problem. She knew Mr. Tabakman and evidently knew Mr. Sanchez. She knew that they had been working and doing a good job, and she thought that possibly they should be considered for reappointment.

As the discussion went on, she implied that she couldn't do very much for Mr. Tabakman because he was an active Republican, and I can remember her saying that he had been extremely active in a recent campaign, and that campaign was for the judgeship of Mr. Wray, and she said under this basis it would be difficult for her as a Demcoratic town chairman to assist someone that had worked openly and directly in this kind of a campaign.

As far as Mr. Sanchez was concerned, she thought that this man deserved an opportunity because of the time he put in as a volunteer and the fact that he had a couple of years, I'm not sure whether it is two or three years' experience, that he should be kept on.

I also believe that he was bilingual, et cetera. She said she would do [278]
what she could to help him because he was non-political and she asked that he send his resume to her office.

Q During the course of your discussion with Mrs. Troy, did she evidence to you the fact that she was aware of Mr. Sanchez's political affiliations, if any?

A I was the one that reminded her that he was not a Republican or Democrat.

Q Did she in response to that statement make any comment concerning whether that would make it more or less difficult for him?

A She said it would be a lot easier to do something for Mr. Sanchez because he was not politically affiliated with any group.

MR. WAGNER: Thank you, Mr. Mascola. No further questions, your Honor.

CROSS-EXAMINATION

BY MR. SCHOENBERGER:

Q Mr. Mascola, when were you elected to the Rockland County Legislature?

A 1969.

Q When did you assume the office of a legislator in the County of Rockland?

A January 1, 1970. [302]

J O H N M C C A B E, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q Mr. McCabe, do you currently hold any positions in government in Rockland County?

A Yes, I am assistant public defender and I am the Village Attorney in the Village of Haverstraw, New York.

Q When were you an assistant public defender?

A January 3, 1978.

Q When were you appointed Village Attorney for the Village of Haverstraw?

A At the organization meeting in 1975, I believe it would be April 1st.

Q You currently hold both those positions, isn't that correct?

A I have submitted to the Village

Board a resignation due to the fact of the circumstances of the appointment, I told them that I would be willing to assist them in the interim until a new Village Attorney is appointed.

Q When does the resignation become effective? [303]

A I talked to them the first Wednesday of January when we had an organization meeting. I am sorry, not an organization meeting, the first meeting subsequent to my appointment as public defender, the first board meeting.

Q Did you tender your resignation effective as of any particular date or are you still Village Attorney?

A I believe I technically am Village Attorney. I told them I would submit a resignation as soon as the board was prepared to appoint a replacement. [304]

Q Now, your resignation as Village Attorney, was it your idea to resign or was that requested of you by Mr. Branti as a condition precedent to your being appointed assistant public defender?

A I had decided, based on the

experience of other people I have seen who held two jobs at once, that it wasn't a good idea to hold both, and that when I initially talked to Mr. Branti about this I mentioned that I had this position, and would have to resign it.

Q Did Mr. Branti ask you to resign it?

A Subsequent to the appointment he asked me what the status was with reference to the Village and when I would be departing that job.

Q When you had a conversation with Mr. Branti concerning your appointment, and the fact that you already held a job with the Village of Haverstraw, did he advise you that you would be required to resign from your present job to take the assistant public defender's job?

A "Required" is a loaded word. I would say, disapproved of the holding of both positions and felt that, expressed to me the feeling that a public defender should not simultaneously work for a municipality and the County.

Q He gave you an opportunity to resign

your first job so you could be appointed to the second one, is that correct? [305]

A Are we talking about sequentially what had to be --

Q Withdraw the question.

He gave you an opportunity to resign as Village Attorney so that you could be appointed and hold the position of assistant public defender, is that correct?

A I had already said, that is what I was going to be doing.

Q Did he say to you, in effect, okay, as long as you are going to resign I will appoint you as assistant public defender?

MR. APOTHEKER: Your Honor, I have given the plaintiffs' attorney a little latitude in leading the witness but that is going a little far afield.

THE COURT: Overruled.

(Question read.)

Q Or words to that effect?

A I don't know that he ever said, expressly, used the phraseology mentioned. It was quite clear between us that I would have to leave the Village position in order

to be appointed a public defender.

Q But it was all right with Mr. Branti to appoint you as long as you were willing to leave the Village Attorney's job, is that correct? [306]

A Are you asking --

THE COURT: Isn't that what he just said?

MR. WAGNER: I'm not sure, your Honor.

THE COURT: Would you read the last answer, please.

(Record read.)

MR. WAGNER: I'm sorry, your Honor, he did answer the question. I will withdraw that subsequent question.

Q Mr. McCabe, you now have a private practice as well as having been appointed assistant public defender, is that correct?

A Yes, that is correct.

Q Can you tell us when you were admitted to practice in New York State?

A April 14, 1970.

Q Prior to January 3rd of 1978, when you were appointed assistant public defender, have you held any other, with the

exception of the Village Attorney, any other governmental jobs?

A No, other than, of course, the Army.

Q We will call that a government job.

A All right. [316]

*

Q Now you are working for the Public Defender's office. Do you see any connection between working for a law firm and working for the Public Defender's office?

MR. WAGNER: Objection, your Honor. I think that is very vague. I don't know that he means by connection.

THE COURT: Maybe the witness understands it.

A I would say that it is very analogous to a private firm, in the sense that your operations and your atmosphere are very similar. You have a relatively small group of individuals devoted to a common purpose, support personnel, and the atmosphere in the Public Defender's office I have found it quite similar to law firms for whom I have worked and with which I am familiar.

I find the relationships, for instance, between and among the attorneys in the office very similar in both situations.

It is different in that the Public Defender's office has a much, shall we say, larger social goal to accomplish than most of your private firms.

I think this is probably the single controlling motivational force in the Public Defender's office, this feeling for what you are doing there is extremely important to [317] your clients. I mean you are talking about, very generally, clients who have no other access to whatever society has to offer except you. You are talking about people, I mean, in private practice, if you make a mistake, there are certain financial consequences about which you will hear. In the Public Defender's office, if you make a mistake or you don't do the job properly, you could get a kid in jail, and his life will be marked, and I find the spirit in the Public Defender's office is not surprising under these circumstances a very tight, cohesive unit, very much of a, the word group is overused in this society, maybe perhaps team would be a better word, and

there is an analogy to private law firms, a very strong one I feel.

Q Feeling of trust among the partners and feeling of trust among the Public Defenders?

A Yes. I find it is very pronounced.

MR. APOTHEKER: No further questions.

MR. WAGNER: I have nothing further, your Honor.

THE COURT: Thank you.

I see that Mr. Blumenfeld is still in the courtroom. I would like to ask him to take the stand again. You are excused. [318]

(Witness excused.)

G E R A L D B L U M E N F E L D, recalled by the court.

THE CLERK: You are still under oath, Mr. Blumenfeld.

BY THE COURT:

Q Mr. Blumenfeld, would you tell me the circumstances under which you came to be appointed a Public Defender?

A Yes, your Honor.

I would say some time in the fall, Harriet Cornell called me on the telephone and asked me if I had any interest in any

positions which might become available, and I indicated to her that I had an interest and that, I guess I just was aware from reading the newspapers that there might be certain positions available, and I told her that I would like to think about it, and I would let her know whether I had a real interest, and I believe I called her the next day, and I told her I would have an interest, and she indicated that she would suggest my name for one of the positions that might become available, and I believe she did that.

Also, prior to that, I guess, I had had a conversation with Mr. Branti at one time, in which he indicated that he might seek the position or he was going to seek the posi- [319] tion of Public Defender, and we talked about it very briefly, and I indicated I might have some interest, and he expressed some interest, if I were to consider it. I suppose he had some knowledge of my background and he expressed an interest and said I should come by and talk to him about it, if it went any further, and I had spoken to Mr. Branti once or twice on the telephone, I think, in November or December, and just in

very general terms, and I think he indicated at one time that he wanted me, and then I just was advised, I don't even know how, that I was going to be considered or that he was considering me, and that I would be appointed as an Assistant Public Defender.

Q Did you tell Mr. Branti at any time of your conversation with Mrs. Cornell?

A I don't believe so.

Q Did he mention that to you at any time?

A I believe he may have indicated that she may have called him and said that Jerry Blumenfeld had an interest in the Public Defender's office, and probably, I believe she said, would you consider him as an appointee?

THE COURT: Mr. Wagner, do you have any further questions?

MR. WAGNER: Just one, your Honor. [320]

BY MR. WAGNER:

Q Do I understand your testimony, Mr. Blumenfeld, to be that the Democratic county chairman sought you for the position initially?

A I wouldn't really say that. She did call me and ask me if I had an interest

in the position.

Q She initiated the proceedings whereby you became Assistant Public Defender. You didn't go to her and say, "I want the job." She came to you and said, "Do you want the job?", is that correct, or "Are you interested?"

A No, I don't think so. She asked me if I had an interest in a position and I indicated I would.

MR. WAGNER: No further questions.

MR. APOTHEKER: Just one question, your Honor.

THE COURT: Yes.

BY MR. APOTHEKER:

Q Mr. Blumenfeld, are you a CPA, Certified Public Accountant?

A Yes, I am.

Q How long have you been?

A 15 years.

MR. APOTHEKER: No further questions.

THE COURT: Do you find that experience helps you as a Public Defender? [321]

THE WITNESS: Well, Mr. Branti

was aparently interested in it. He was aware that I was a Certified Public Accountant, and apparently he felt that it would be of assistance to him in budgets; he indicated I might be able to help him with that and then he raised a question of certain grants that might be available, and he felt that I might be of assistance in arranging or working on certain federal or state opportunities or grants that might be available, and he was rather interested in that fact, and also in the fact that I had been a village justice in West Haverstraw.

THE COURT: Thank you, Mr. Blumenfeld.

(Excused) [329]

MR. APOTHEKER: May I suggest something to your Honor? Would that cause a delay in the course of burdening this court, that if I can produce an affidavit from every single county legislator, or most of them, that they were not the source of the story, and that the remaining ones that I cannot produce such an affidavit for, that he is free to call, if we can limit it to that then I would be satisfied.

THE COURT: I don't think that's the only thing that is involved here. I am not going to limit the plaintiff here in the evidence that he offers. I think, as he says, that there has been no pre-trial here, and so what we have had is really, to some extent, discovery during the course of the trial.

Let me suggest this as a possible approach, gentlemen. In lieu of the procedure we have been following which is a parade of witnesses who have never been examined by the attorneys offering them, that we have a schedule of depositions which can be taken up in Rockland County, taken in fairly short order, and we suspend the trial for a few days until they are completed? Does that make any sense? Would that be more convenient for both sides?

MR. WAGNER: That's perfectly satisfactory to the plaintiffs, your Honor, I think that's an excellent idea. [330] We might be able to obviate the need to bring in some of these witnesses.

MR. APOTHEKER: No problem, your Honor.

MR. WAGNER: I assume the defense will make them available to us. [331]

THE COURT: Just one second.

I can see problems because I can see arguments coming up as to the propriety of questions. I think, Mr. Apotheker, you have gotten a general flavor of my willingness in this non-jury trial to take evidence. I will make the judgment later as to whether that evidence should be given any weight or not, and I can see that as a problem. If these depositions become hotly contested, then you will be trooping down here for rulings on the questions of evidence. I would suggest, if these depositions took place and if you made your objections on the record, and then the witnesses went on and answered, this might work very well.

I would also suggest in this situation that the witnesses were talking about are witnesses and not parties any more, and so the extent to which you can go, really, is to make your objection, not give a direction that the witness not answer.

MR. APOTHEKER: Your Honor, I believe Mr. Branti would like to address the Court.

DEFENDANT BRANTI: Your Honor, I am the defendant at this particular time. I would like to have an opportunity over the weekend to discuss this with my attorney before we decide on any course of action, if it would please the Court. [332]

MR. WAGNER: Your Honor, since we have no schedule scheduled this afternoon, do you think Mr. Branti's attorney can agree by late this afternoon?

THE COURT: Yes, I think this is the problem. Right now I've got Monday put aside for this case. Suppose we say that over the luncheon recess Mr. Branti discusses this with the County Attorney and we come back briefly to determine just what our future course is; is that satisfactory?

MR. APOTHEKER: Yes, your Honor.

THE COURT: All right. I think we better say that we will get together at 1:50 because I have a two o'clock matter.

MR. WAGNER: Very well, your Honor, 1:50. Thank you.

(Luncheon recess taken at 12:40 p.m.) [333]

AFTERNOON SESSION

2 P.M.

MR. APOTHEKER: If your Honor please, over lunch I had an opportunity to discuss that facet of the discussion earlier concerning the possibility of depositions. Your Honor, after thinking about this quite thoroughly, it is my impression that to have depositions in this case at this time will only make matters worse, as far as I am concerned. I don't want these witnesses to have to come down here, have to have depositions, have to have this and have to have that and turn this matter even into more of a political trial than it is already.

Mr. Wagner, let's sit down, tell me who you want, tell me who want to examine extensively, tell me who you want affidavits from regarding Mr. Seltzer, and let's finish this case. I am ready to proceed with this case. Let's finish it already.

MR. WAGNER: Mr. Apotheker, I believe most of the witnesses you referred to are county legislators. I will be willing to depose them at the county office building when they are there on county business. I will depose them in the evening so their

work schedule is not interrupted. I think we can probably save them from coming to New York by deposing thim in the evening up at the County office building. [334]

MR. APOTHEKER: Your Honor, frankly, if I thought that that would solve the problem of them coming down here the least bit of a minute, then I would agree. But, it is not. Me all know that Mr. Wagner wants to drag these people down here. We know that.

MR. WAGNER: I object to that, Mr. Apotheker. I don't want to drag anybody down here.

THE COURT: I think I would rather object to that too, Mr. Apotheker, since if you will remember we moved into their phase of the trial at my specific suggestion when I pointed out that I did not have enough facts to make a ruling here. So, we are in this phase because I, in effect, have required us to move into this phase. I am not trying to make a political trial out of this.

MR. APOTHEKER: I understand that, your Honor, and I have not accused the court

of so doing, believe me. What I feel is that your Honor has, as he said, ordered this trial to go into this particular phase. He wanted to hear testimony from county legislators, he wanted to hear testimony as to how Mr. Branti was appointed and how his assistants were appointed. You have had the opportunity to hear testimony from the Democratic chairperson of Rockland County, [335] from the town chairman of Ramapo, from three county legislators. If your Honor wants to hear more testimony from the county legislators, we will be happy to oblige them. I don't want to delay this thing any longer. Let's get through it.

THE COURT: My suggestion this morning was that if we proceeded by way of depositions, we would probably, for the most part, be able to dispense with the necessity of bringing a great many of people who will otherwise be called to testify down to testify. Now --

MR. APOTHEKER: I don't believe that to be so, sir.

THE COURT: If you don't and if you are not willing to proceed that way, we

will proceed the other way. It does seem to me that that would be a much more economical way to proceed so far as the time of everybody concerned.

MR. APOTHEKER: I wish I could agree, your Honor, but I can't.

* [348]

MR. WAGNER: At this time, the plaintiffs would like to call the Honorable Anne O'Sullivan to the stand.

A N N E O ' S U L L I V A N, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q Ms. O'Sullivan, do you hold any position in the Rockland County government?

A Yes, I am a legislator.

Q You were, as a matter of fact, elected to that position in the election of this November, 1977, isn't that correct?

A Yes, I was.

Q After your election, did there come a time when you had occasion to discuss or to be advised that there were certain appointments which were available to

be made to various County offices?

A Yes. * [357]

Q Did Mr. Damiani ever allude to you to the fact that he had received a resume from Mr. Tabakman or that he had been approached by Mr. Tabakman in a request that either he or yourself sponsor him?

A No.

Q Do I understand from your testimony that you yourself put in the name of William Nelson to continue in the Public Defender's office?

A Yes.

Q What was the basis for your recommending Mr. Nelson?

A There were many reasons. I had been approached by people who had worked in the Public Defender's office and been told that he had done an excellent job. He had served for a couple of years, at least as the deupty, to Mr. Barone, and he was a black man, and considering the fact that some of the Public Defender's cases deal with the minorities in Rockland County, I felt that all of those factors were very important in keeping him there.

Q You say that one of the factors you consider was the fact that he was experienced, having served under the prior or the then Public Defender whose term was about to expire? [358]

A Yes.

Q Did you not also feel that that experience was worthy of some consideration with regard to the possible reappointment of other Public Defenders?

A They never came under my consideration.

Q Ms. O'Sullivan, I show you Plaintiffs' Exhibit 7 in evidence and I call your attention to the second paragraph which states in essence, "The selections," referring to the selections of the Assistant Public Defenders, "were actually made by the Democratic caucus composed of the parties 11 county legislators."

Do you know Bob Seltzer who wrote this article?

A I spoke to him on the telephone. I don't know whether or not I ever met him.

Q Did you make that statement to Bob Seltzer?

A No, I did not.

Q Do you know who did?

A No, I do not. I would like to.

* [361]

Q You alluded to the fact Mr. Nelson, as a black, you felt, would be a value to the office of Public Defender because it deals with minorities?

A Yes.

Q Are you personally aware, yourself, of the political enrollment of the current nine Deputy Public Defender appointees?

A No, I am not.

Q Would you accept the fact, if I tell you, that there are eight Democrats and one black registered?

A I have no reason to doubt your word.

Q Wouldn't you feel that since I am sure there is sufficient number of Republicans and Independents and Liberals represented by the Public Defender's office, wouldn't you feel there should be some Republicans in there too?

A I don't know if I can editorialize, but it seems to me you are commenting on exactly what we are fighting about here. [362]

If we are not going to appoint people on the basis of their political

party, why would I consider whether they were Republicans, Liberals or anything else.

Q You are saying you didn't appoint people on the basis of their political party?

A That wasn't a primary consideration.

Q Was it a consideration?

A Not to me.

Q Did you yourself recommend any Republicans?

A I already stated who I recommended. There were only two recommendations.

Q Neither of them were Republicans?

A No.

MR. WAGNER: No further questions.

CROSS-EXAMINATION

BY MR. APOTHEKER:

Q Ms. O'Sullivan, did you at any time advise any of the plaintiffs, either Mr. Tabakman or Mr. Finkel, that they would have to join the Democratic Party, contribute money to the Democratic Party or swear allegience to the Democratic Party in order for them to be retained in their jobs?

A I could not have done that since I have never spoken to either gentleman.

*

Q Mr. Damiani, did there come a time subsequent to your election, when you had occasion to discuss the appointments available to the incoming legislature? [365]

A No, sir. I don't recall any such thing as being predetermined, whatever. I don't recall anything like that.

Q Well, you had served in county government, you had served as a county legislator for four years prior to your reelection this year, is that correct?

A That's right.

Q So you knew that there were certain positions in county government which were not Civil Service and were subject to appointment, is that correct?

A That's correct.

Q And among those positions were Assistant Public Defender and Assistant County Attorney, is that correct?

A No, not as I understand it. Actually the only two in that particular area would be the County Attorney and the Public Defender. Assistants are generally picked by the County Public Defender and the County Attorney.

Q Do I take it then, Mr. Damiani, it was your impression that the County Attorney and the Public Defender had the complete right to appoint anybody they wanted to as assistants?

A That's correct. * [367]

Q Is it your testimony, then, that you showed her a list of all the people who had asked you to recommend them?

MR. SCHOENBERGER: Objection, your Honor.

A No.

THE COURT: Objection overruled.

A I don't know as I presented the list but I believe that I spoke to her about them.

Q Then it is your testimony that you verbally advised her as to all of the attorneys who had come to you and requested your consideration for either of these two spots?

MR. SCHOENBERGER: Objection, your Honor. That has been testified to and now he's attempting to badger the witness.

THE COURT: Overruled.

(Question read)

A I believe it was discussed. [368]

Q Could you tell us approximately how many were on this list that you had?

A I would say in the area of six names.

Q Could you tell us, if you recall, what the six names were?

A You will have to give me a little time.

I think the names were Allison, Nelson, Costa, Bolton, Savad.

I think that was about it. I don't recall if there was another one, at this point. I can't recall.

Q Mr. Damiani, are you aware of the political affiliation of these five gentlemen you have mentioned?

A I have seen many of the men or some of the men in various political functions on either side.

Q Such as?

A I would say that Allison I believe at one time was a committeeman, many years ago, or some years ago.

Q In what party?

A Democratic Party.

Q Bill Nelson?

A Bill Nelson, I don't know what he is.

Q John Costa, do you know his registration?

A No, I don't. I never asked him that.

Q Mr. Bolton, is that Ed Bolton? [369]

A Ed Bolton, yes, sir. I don't know what he is either. I never asked him that.

Q And Paul Savad, do you know his registration?

A No, sir, I don't.

Q Were these the only five gentlemen who approached you and asked for your help in obtaining this position?

A No, I think there were others.

Q But you didn't discuss the others with Mrs. O'Sullivan?

A I may have. I don't recall.

Q In any event, these are the only five that you specifically recall discussing with Mrs. O'Sullivan?

A I think so.

Q By the way, Mr. Bolton, Ed Bolton, is he a law partner of Terrence Ryan, do you know?

A It is very possible. I think it was mentioned in his resume, that he was a law partner. I don't know which one I could attribute that to. I think the name Ryan was involved in one of the resumes. I don't know which one.

Q When did you discuss these names with Ms. O'Sullivan?

A At one of the caucuses. Which one I don't remember. [376]

Q Would it refresh your recollection if I were to tell you that it did take place before the appointments were made and that he discussed the possibility of your submitting his name to the Democratic caucus as a possible assistant public defender?

A No, it doesn't.

Q So then it is your testimony today that you have no recollection as to what the conversation was about?

A No, sir.

Q Did you have, to the best of your knowledge or recollection, any business or any other dealings with Mr. Tabakman?

A Not that I can recall.

Q Mr. Damiani, I show you Plaintiffs'

Exhibit 7 in evidence and I call your attention to Paragraph 2 thereof which reads, "The selections (referring to the selections for assistant public defender) were actually made by the Democratic caucus, composed of the party's 11 County legislators," and I ask you, did you make that statement -- I'm sorry, do you know Bob Seltzer, the writer for the Journal News?

A Yes, I do.

Q Did you make that statement to Bob Seltzer? [377]

A No, sir, I did not.

Q Do you know who did?

A No, sir, I do not.

MR. SCHOENBERGER: Once again, your Honor, if I may, for the record, my recollection is that was admitted in evidence only to show it appeared in a newspaper, not with reference to the truth or falsity of anything printed therein.

In certain respects I wish the Court would instruct Mr. Wagner that when he asks the witness with reference to that, that that be made clear.

By producing it and saying it

is in evidence, it carries a different connotation than what it actually was introduced into evidence as.

MR. WAGNER: There is no jury. The judge is aware of the purpose of the document. I'm not allowing --

THE COURT: I don't understand your objection.

MR. SCHOENBERGER: I'm saying, your Honor, when --

THE COURT: You mean every time that we have reference to that you want a statement put in the record as to the purpose for which that was admitted into evidence so that the witness will be informed. I will overrule the objection. [378]

MR. WAGNER: I believe the question was asked and answered by Mr. Damiani; he did not make the statement or know who did make it.

THE WITNESS: No, I do not and I do not know who could have made it.

Q Mr. Damiani, did you have occasion to discuss the testimony that you were going to give today with anyone from the County attorney's office before you came in today?

A I spoke with my attorney, yes.

Q Who is your attorney?

A Mr. Schoenberger.

Q Now, Mr. Damiani, are you aware of the fact that initially you were one of the defendants in this lawsuit?

A Yes, sir.

Q Did there come a time when you were advised by anyone from the County Attorney's office that you were no longer a defendant in this lawsuit, that Mr. Branti was the only defendant?

A I think that was mentioned, yes.

Q And subsequent to you being told you were no longer a defendant, you still continued to have discussions with Mr. [379] Schoenberger?

A I see the County attorneys every day in the week. I speak to them all the time, and in passing, this could have happened, and I could speak to them during the day, you know, when I see them. Am I supposed to not speak to the attorneys?

Q Mr. Damiani, did you have occasion in the last several days to sit down -- I'm not talking about passing someone in the

corridor or a passing allusion; I'm speaking about sitting down at a table or sitting down -- period -- with one of the assistant County attorneys and discussing the questions that might be asked of you and the answers you might be required to give?

A I believe that we spoke about what was transpiring at the trial.

Q And when was the last such conversation you had with your attorney, Mr. Schoenberger?

A I think it was Saturday or Sunday.

Q And at that time, Mr. Damiani, did you have occasion to review or look at any of the transcripts or minutes of the prior testimony which had been given?

A No, sir, it did not interest me.

Q Do you know whether Mr. Schoenberger, when he spoke to you, had that in front of [380] him?

MR. SCHOENBERGER: I'm going to object to this line of questioning, your Honor.

THE COURT: Overruled.

A No, I don't remember him having any papers in front of him.

Q He had no papers in front of him at all?

A I say I don't remember him having any papers in front of him. I wasn't in that proximity where I could see any papers in front of him. I was in an audience with people that were there.

Q Well, was Mr. Schoenberger sitting at a table with you?

A He was sitting -- there was a table, and we were sitting around the area, yes.

Q Was he sitting across from you or next to you?

A He was sitting in the area.

Q And it is your testimony that you did not see that he had any papers on the table or you don't recall?

A I can't recall whether he had a transcript in front of him, whether it was a newspaper in front of him or what it was. [381]

Q He did have some papers in front of him?

A I don't know what he had.

Q Were they papers?

A Papers, yes.

Q All right, that is all I want to know.

Who else was in that audience with you at that time?

A I think Mrs. Sullivan was there at one time.

Q Mrs. O'Sullivan?

A Mrs. O'Sullivan, yes. Mr. Rotella was there.

Q Mrs. Cornell?

A Yes.

Q Anybody else that you can recall?

A No.

Q Was this a regular meeting of some committee of the legislature or was this -- what was the purpose of the meeting, as far as you know?

A As far as I know, it was a clubhouse, and we go there when we need to go there, you know, when we feel the spirit moves us to go to the clubhouse.

Q The clubhouse?

A Yes.

Q What clubhouse?

A It is a place where the Democrats go. [382]

Q The Democratic Town or County Headquarters?

A Yes, it could be, it could be called that.

MR. WAGNER: I have no further questions of this witness, your Honor.

THE COURT: I have a couple of questions, Mr. Schoenberger, before you begin.

EXAMINATION BY
THE COURT:

Q Was the public defender chosen by the legislature?

A His name was recommended at a caucus, sir, your Honor.

Q He was selected at a caucus?

A Yes.

Q And were various people considered for the position of public defender?

A I don't recall various. The only name that I recall is Mr. Branti's name, sir.

Q Well, at this caucus, was there a discussion of Mr. Branti before the caucus decided to recommend him to the legislature?

A Yes, sir. [394]

*

MR. APOTHEKER: I object to that question. I fail to see the relevance. Mr. Branti and Mr. Paris were appointed.

THE COURT: Overruled.

(Question read.)

A They were both recommended for these positions on their qualifications. Mr. Paris was assistant County attorney for quite a few years and Mr. Branti was the assistant to the DA for quite a few years, and they were both highly qualified with worlds of experience. They were recommended to the caucus and that is it.

Q Did the fact that Mr. Coleman from Ramapo wish to become the chairman of the legislature have anything to do with the fact that Haverstraw was given these two appointments?

MR. APOTHEKER: Your Honor, I think the witness is being led.

THE COURT: Yes, he is, but I would expect that you could concede that he is not a witness that has been examined in advance and prepared by the plaintiffs. I will recognize the witness is a hostile witness and permit him to be led. [409]

MR. WAGNER: Your Honor, we'd like to call the Honorable Dr. Richard Sullivan to the stand.

R I C H A R D J. S U L L I V A N, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q Dr. Sullivan, do you have any official position with the county government of the County of Rockland?

A I'm a County Legislator.

Q When were you so elected for the first time?

A In 1974.

Q If I'm not mistaken, you were just reelected in this recent 1977 election?

A That's correct.

Q Dr. Sullivan, did there come a time subsequent to the elections of November of this year when a discussion was had among the Democratic County Legislators concerning certain appointments which would be made by the incoming legislature?

A I assume you are referring to did we have a caucus?

Q Caucus, meeting, whatever you want to call it, yes.

A Yes, there were several caucuses.

Q At those caucuses did the question of the appointments of the Public Defender and County Attorney come up? [410]

A Yes, it did.

Q With regard to the Public Defender, was there more than one name in contention for the position of Public Defender?

A There were several names mentioned, as I remember.

Q Did anyone attempt to elicit your support for any of those potential nominees, either the nominee himself or anyone else on his behalf?

A No.

Q Could you tell us, as best you can recall, with whom you discussed these appointments?

A What appointments? Public Defender?

Q And County Attorney.

A Well, at the caucus I'm sure that -- you know, a caucus is not run by Robert's Rules. I'm sure I mentioned the names, but I couldn't specifically tell you anyone I discussed either individual with.

Q Would it be fair to state that the potential nominees for these positions were

discussed in a general fashion at the caucus?

A Yes.

[414]

*

Q But you testified that you played no part in the initial proposing of those two names for those positions, is that correct?

A That's correct?

Q Did there come a time, between the November election and the appointments of the County Legislature, when the Assistant Public Defenders and Assistant County Attorneys were discussed in caucus?

A As I said, I didn't attend all the caucuses. I do recall Harriet Cornell, our county chairman, saying there would be 12 to 14 openings in the County Attorney's office and the Public Defender's office and if I had any recommendations to submit them to her.

Q Now, did you in fact submit any recommendations?

A Yes, I did.

Q How many did you submit?

A Two.

Q And they were? The names?

A Mr. McCabe and Mr. -- I can't recall his name.

Q Well, Mr. McCabe was --

A Mr. McCabe and I will think of the name.

Q Mr. McCabe was appointed --

THE COURT: Just one second; he is still answering the question. [415]

A Feinberg, Wayne Feinberg.

Q And both of these were submitted by you as Assistant Public Defenders, is that correct?

A No. That is not correct. They asked me to submit two names, and -- they asked me if I had any recommendations, and at a subsequent caucus, I recommended Mr. Feinberg and Mr. McCabe.

Q For what positions?

A For any one of those 14 positions, 12 to 14 positions that I was told that there would be vacancies, where there would be vacancies.

Q In other words, it is your testimony that at the time you submitted these names you were not sure whether they were going to be submitted for Assistant County Attorney or Assistant Public Defender?

A I did not, except Mr. Feinberg did speak to me some time late in December, that he was interested in being in the Public Defender's office, that he had served with Mr. Branti in the District Attorney's Office, that they had had a good relationship, that he felt he would like to serve in the Public Defender's office, but I did not specifically make any recommendation to where he -- recommendation as to one office or the other. [416]

Q Did Mr. Feinberg tell you that he was Mr. Branti's choice as Chief Assistant Public Defender and that Mr. Branti had wanted him for this job for some --

A He told me Mr. Branti wanted him for the job, would like to have him for Public Defender -- I don't know specifically about any particular job except, at least, he wanted him in the Public Defender's office.

Q Dr. Sullivan, if Mr. Branti wanted Mr. Feinberg in the Public Defender's Office, why then was it necessary for you to sponsor him?

MR. APOTHEKER: I object to that question, your Honor.

THE COURT: Overruled.

A I didn't sponsor him.

Q Why was it necessary for you you to put his name to the Democratic caucus?

A To recommend him, because the County Attorney asked me if I had any recommendations and I did -- I had two recommendations; and I made the recommendations.

Q You said the County Attorney. You mean the county chairman?

A County chairman.

Q Dr. Sullivan, did there come a time when you had occasion to have a conversation with Mr. McCabe? [417]

A Yes.

Q Could you tell us, to the best of your recollection, as to the content of your testimony with Mr. McCabe, what you said to him?

A it was a telephone conversation. He mentioned that he would be interested in one of the appointments to the vacancies that existed. He did not specifically mention either the Public Defender's office or the County Attorney's office.

Q Let me see if I have got this

correct. When Mr. Feinberg came to you, he told you that Mr. Branti had already indicated that he wanted him in the Public Defender's office, is that correct?

A I wouldn't characterize it as that.

Q How would you characterize it?

A He discussed -- he had known Mr. Branti for a long period of time, worked with him in the District Attorney's office. Mr. Branti had suggested to him evidently that he would like him, if possible, in the Public Defender's office.

Q Is it your impression as a County Legislator, that the County Legislature has to approve the appointment of Assistant Public Defenders? [418]

A No.

Q Is it your opinion that Mr. Branti has the absolute say as to who he appoints?

A Yes.

Q If Mr. Branti could appoint Mr. Feinberg as a matter of absolute right why would Mr. Feinberg have to come to you and ask you to put his name before the Democratic caucus?

A You will have to ask Mr. Feinberg that question.

Q Mr. Sullivan, Dr. Sullivan, I'm sorry, I show you Plaintiffs' Exhibit 7, and I call your attention to the second paragraph thereof, which states, "The selections (referring to the selections of Assistant Public Defender) were actually made by the Democratic caucus composed of the party's 11 County Legislators."

Do you know Mr. Bob Seltzer whose byline appears on this article?

A Yes.

Q Did you yourself make that statement to Mr. Seltzer?

A No.

* [422]

Q You know his family for how long?

A The McCabe family and the Sullivan family have been well known to one another for a couple of generations.

Q You know him to be a competent attorney and a fine person?

A I do.

Q You had no hesitation in recommending him for either County attorney or public defender?

A Absolutely not.

Q Did you have any other reason for recommending Mr. McCabe?

A I've known bill McCabe, his father, and John, as I say, for a long period of time. I practiced in Haverstraw in a depressed area for thirty years. Mr. McCabe and his son, John, Ambrose, and other McCabes, were, like myself, philosphically attuned to good medical care for the poor and good legal care for the poor. As a matter of fact, the reason I ever ran and became involved in politics I thought as a physician working in a depressed area, seeing the very poor and difficult conditions, that I thought that as someone in government I could make a contribution, and I think I have made a contribution to the health problems that exist in Haverstraw and in the other depressed areas in the County. [423]

Q Did you feel that Mr. McCabe could make a contribution in his own way as an assistant public defender?

A I'm sure he was, like myself, philosophically attuned to the problems of the depressed area, of the ghettoes, and that he would serve tremendously either in the family court or as a public defender.

Q Mr. Sullivan, you are a town delegation of one, I believe, is that correct?

A Yes.

Q You didn't have to discuss your recommendations with anyone, did you?

A That's correct.

Q Dr. Sullivan, did you at any time ever tell either of the plaintiffs, Mr. Tabakman or Mr. Finkel, that in order for them to keep their jobs they would have to contribute money to the Democratic Party, swear allegiance to the Democratic Party or join the Democratic Party?

A I never met either gentleman till the other day when they served me the subpoena. Never met either gentleman.

MR. APOTHEKER: No further questions, your Honor. [424]

THE COURT: Thank you, Dr. Sullivan.

(Witness excused.)

MR. WAGNER: Your Honor, as we advised the Court earlier, there are four other witnesses to testify.

Mr. Grant, we have agreed, need not testify. Mr. Apotheker mentioned to me this morning that he just wanted to know

the wording of the affidavit which I wanted drawn by Mr. Grant. That relates only to the conversation with Mr. Seltzer.

Mr. Coleman, as your Honor is aware, is still out of the country.

Mr. Gdanski, to the best of my knowledge, is still ill, and Mr. Rubenstein, as your Honor heard earlier, we have attempted to subpoena over the weekend.

It is my understanding that, from our discussion on Friday, that this case will go over to February 8th at 2:30 p.m., is that correct?

THE COURT: I think that is what we agreed, yes.

* [433]

S A M U E L C O L M A N, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q Mr. Colman, do you hold any official position in Rockland County government?

A Yes, I do.

Q What is your position?

A I am Chairman of the Rockland County Legislature.

Q You were re-elected this past November? Is that correct?

A Yes.

Q You are now serving your second term?

A Yes.

Q Now, Mr. Colman, did it come to your attention at any time, either before or after the elections of this past year, 1977, that certain county offices would be required to be filled by the incoming Legislature, and I speak specifically of the County Attorney and the Public Defender?

A Yes.

* [438]

THE COURT: Just one second.

THE WITNESS: I answered the question that we let it be known to all delegations, not only Mr. Branti and Mr. Paris, we let it be known to all delegations that that is all we were interested in and we would not recommend candidates

to any other major office.

Q Now, if I am not mistaken, Mr. Colman, the current makeup of the Rockland County Legislature gives Ramapo six legislators, all of whom are democrates? Is that correct?

A That is correct.

Q There are eleven democratic legislators altogether?

A Yes.

Q So Ramapo has six; Haverstraw has two, and Haverstraw's entire delegation is two?

A Yes.

Q Two democrates. So, in effect, Ramapo and Haverstraw have 100 percent democratic delegations? [439]
Is that correct?

A That is correct.

Q And Clarkstown has three republicans and two democrats?

A That is correct.

Q And Stoney Point has one delegrate, and that is a democrat? Is that correct?

A You left out Orangeburg.

Q And the Town of Orangeburg has no democratic delegates?

A That is correct.

Q Now, did there come a time when you had occasion to discuss with your delegation the fact that there were some Assistant County Attorneys and Assistant Public Defenders to be appointed?

A We discussed that there will be opportunities for us to make recommendations to Public Defender and to County Attorney, yes.

Q Did there ever come a time when it was agreed that your town specifically, Ramapo, would be entitled to a certain number of recommendations to each position, that is, Assistant County Attorney and Assistant Public Defender?

A I believe that a number was agreed to for a total to both, but not [440]
specifically.

Q Do you recall what that number was?

A I believe the number was six. I'm not sure.

Q In other words, that there would be

six Assistants to be divided up between the Public Defender and the County Attorney's office?

A it was agreed that Ramapo would be given the opportunity to make six recommendations.

Q That is, six in toto?

A that is correct.

Q did you yourself recommend anyone to either position? By that I mean, Assistant County Attorney or Assistant Public Defender.

A Not exactly. I let it be known to the other members of the Ramapo Delegation that I was primarily interested as incoming chairman that those Assistant County Attorneys that were serving now should be recommended to the new County Attorney for reappointment.

Q What was the basis for your so stating to your delegation?

A I observed Mr. Schoenberger on numerous occasions. He was serving as an attorney to a committee of which I was chairman, the Transportation Committee. I

was very impressed with the work Mr. Blecher was doing in labor negotiations, and I was [441] impressed with Mr. Hurwitz, who is not from my town, but who moved to my town, in his handling of election law.

So, as incoming chairman, I felt that it was in the interest of my people, as well as in the interest of the Democratic Party and in the interest of good government that those Assistant County Attorneys who were incumbents and did, in my opinion, a good job, be recommended for reappointment.

Q Mr. Colman, do you think that the same philosophy applies with regard to Assistant Public Defenders who were doing a good job, that they should be kept on, too?

A I can tell you that if I was aware of Assistant Public Defenders who did an excellent job, I would make the same recommendation as I made with respect to Assistant County Attorneys.

Q Did anyone ever bring the name of Mr. Aaron Finkel to your attention as an Assistant Public Defender who had served under both Arnold Becker, a democrat, and Frank Barone, a republician, and who was from your town of Ramapo?

A No, I do not recall Mr. Finkel's name being mentioned to me. [445]

*

Q Whose appointments are they?

A Assistant Public Defenders are the appointments of the Public Defender and Assistant County Attorneys are the appointments of the County Attorney.

Q But the recommendations were those of the Democratic Caucus? Is that correct?

A One set of recommendations was coming from the Democratic Caucus.

Q And you yourself did, in fact, recommend three Assistant County Attorneys to be kept on?

A I myself recommended to the Ramapo delegation and to the chairman of the Ramapo Democratic Party that the three incumbent Assistant County Attorneys be recommended for reappointment, yes.

Q Do you know whether the recommendations made by the Democratic Caucus contained the names of any republicans or independents? Or were they all democrats?

A I do not know that.

* [450]

MR. WAGNER: No further questions, your Honor.

CROSS-EXAMINATION

BY MR. SCHOENBERGER:

Q Mr. Colman, did you ever ask of Mr. Finkel or of Mr. Tabakman to either swear an oath of allegiance to the Democratic Party, contribute money to the Democratic Party, or change their registration to the Democratic Party?

A No, I did not.

Q I don't recall whether Mr. Wagner asked you: Do you know Mr. Seltzer?

A Yes, I do.

Q Did you have occasion to speak with Mr. Seltzer just prior to December 15, 1977?

A Yes, I did.

Q At that time did you say to Mr. Seltzer that you hoped the legislators could make a number of recommendations so that Peter Branti and Mark Paris would have a variety of candidates to choose from?

A It is paraphrase. Yes, I said something to that effect.

*

[458]

Q Now, briefly, because I know you could spend a great deal of time on this, tell us, all of us, what the Transportation Committee of the Rockland County Legislature and the Rockland County Legislature did with reference to transportation in Rockland County.

MR. WAGNER: I have to object on the grounds of relevance.

THE COURT: Objection sustained.

Q Did there come a time when the Transportation Committee of the Rockland County Legislature made recommendations to the full Legislature with reference to the recommendations of a transit coordinator?

MR. WAGNER: Objection.

MR. SCHOENBERGER: Your Honor, there has been some argument by the plaintiffs that there has been a pattern within Rockland County of the party in power appointing its own people. This is an example of a top position in Rockland County, top salary and top benefits, and this is an example as to the extent to which the appointment was determined by the Legislature, which was a democratic controlled Legislature and is very

relevant to this alleged pattern.

THE COURT: I will overrule the objection.

[459]

MR. SCHOENBERGER: Would you like the question read back?

THE WITNESS: Yes, I would like the question read back.

(Question read)

A Yes, the Transportation Committee of the County Legislature advertised nationally in professional journals and also in The New York times and the Journal News, and we solicited resumes from all over the country to find the most qualified person who could fill the position of Rockland County Transit Coordinator.

We did that on two occasions, because the first one served us approximately a year and he left, and the second one was hired and he is still with us.

The first one's name was Mr. Hoschek. He was hired from New Jersey. I did not know his political registration when I hired him, and to this day I don't know what his political registration is, though I heard subsequently rumors that he was republican.

The second gentleman is Mr. Thompson. He still serves as Rockland County Transportation Coordinator. He was hired from Mechanicsville, Pennsylvania. I did not check his registration then; I do not know what it is today. He was hired solely on the basis of qualifications. [460]

I would like to add that at the same time as we were advertising in the Journal News and various publications, we also received recommendations through the political process and local applicants, and we chose -- and I am proud to say that I was instrumental in the selection process -- we chose a person strictly on qualifications.

MR. WAGNER: I object to the entire line and ask that the questions and answers be stricken. There is no relevance between the situation here and nationwide solicitation of an expert in a specific field.

The positions of Public Defender and County Attorney are jobs which have traditionally gone to members of the local bar and have traditionally been a political appointment.

I concede by virtue of the specialties required of a transit coordinator there

would be solicitation made nationwide, but I don't see where it is relevant in this case.

THE COURT: I will overrule the objection, although I see the force of the argument.

Q Mr. Colman, did you receive recommendations within the County of Rockland in the Democratic and Republican Parties with reference to a person, a suggestion or a recommendation, that that person be hired for County Transit Coordinator? [461]

A There were names submitted that came through the political process, and there were names submitted for democrats and republicans, yes.

Q Mr. Colman, do you know a George Renc?

A Yes.

Q Does he hold any position in the Rockland County government at present?

A Yes, he is the director of the Department of Audit and Control.

Q Are you familiar with Mr. Renc's background and how he became director of the Department of Audit and Control?

A Yes, he was an appointee of the previous republican controlled Legislature.

Q And at the time he was appointed by the previous republican Legislature, was he a republican?

A To the best of my knowledge and belief, I have not checked it. Yes, he was.

MR. WAGNER: I am going to interpose an objection, unless Mr. Schoenberger brings us to a time reference. Mr. Renc may have been appointed four years go, for all I know. I don't know when he was appointed. [462]

MR. SCHOENBERGER: I will bring it up-to-date and connect it.

Q When the Legislature switched from republican to democratic in January of 1974, did the subject of Mr. Renc's reappointment come up?

MR. WAGNER: I object. It is irrelevant what happened in 1974.

MR. SCHOENBERGER: If your Honor will allow me to finish, you will see its relevance.

THE COURT: It seems to me that part of the plaintiffs' case here are allegations of a political pattern historically.

MR. WAGNER: That is correct, with regard to the positions of County Attorney and Public Defender. There are other positions that I know of my own knowledge where democrats have been reappointed by republicans and vice versa.

It has been brought out in testimony that under the former Board of Supervisors, certain departments, such as the Highway Department, which always came from Stony Point or Haverstraw. That is the way it was done then.

We are limiting the political appointments end of it to County Attorney and Public Defender, and to the best of [463] my knowledge those appointments have been made by the party in power.

(Newspaper article marked Defendants' Exhibit A for identification)

Q To repeat, can you tell us the circumstances surrounding Mr. Renc's appointment in January of 1974?

A Yes. I was a newly elected member of the Rockland County Legislature, and the discussion of reappointment of Mr. Renc, who was a republican appointee from the previous Legislature, was discussed.

I had an opportunity to vote for Mr. Renc's reappointment based solely on his qualifications.

Q Did you vote in favor of his reappointment?

A Yes, I voted in favor of his reappointment.

Q Did the subject of Mr. Renc's reappointment come up again in January, 1978, with the new Legislature?

A I do not recall. I do not recall the question of his reappointment coming up.

Q Mr. Colman, as chairman of the Legislature there are some appointments, particularly now, those to the Manpower Office, that are made directly by you?

A That is correct.

Q If I am not mistaken, didn't you recently make some appointments to the Manpower Office? [464]

A Yes, that is correct.

Effective today, I have made five appointments to the Rockland County Manpower Office, for the position of Manpower Coordinators, on the recommendation of the person in charge of that department, and I have appointed all the members from a civil service

list. I am not familiar with most of the names on that list, nor their political affiliations.

However, on that list the No. 2 person is a well known republican, but at the recommendation for competence from Mr. Condello I proceeded to make the appointment.

I might add that this is in keeping with the pledge I made when Mr. Dusanenko questioned me both on January 1 and on January 3, when I said that non-political appointments will be made solely on the basis of competence, and I intend to be that kind of a chairman.

Q Do you recall the name of the man that was an active republican that you named?

A Mr. Tom Ford. He is the assistant to the republican supervisor of the Town of Stony Point.

Q An active republican in the Town of Stony Point?

A Yes.

Q And even though he is an active republican in the Town of Stony Point, you did not discriminate against him because of his political beliefs? [465]

A No, I did not.

Q I show you from the transcript of the January 3, 1978 meeting, Resolution No. 20 of 1978.

A Yes.

Q What does that resolution mean, Mr. Colman?

MR. WAGNER: Objection. It does not require an explanation.

MR. SCHOENBERGER: Once again, Mr. Wagner sought to elicit testimony from other legislators as to the meaning of that resolution and how it related to these two plaintiffs, and I am attempting to do the same thing.

THE COURT: I will overrule the objection.

A This was a resolution to authorize the Public Defender to appoint his assistants.

Q Within the budget and salaries fixed by the County Legislature?

A That is correct.

Q Anywhere in this resolution does it direct the Public Defender to hire anyone?

MR. WAGNER: Objection. The resolution speaks for itself.

THE COURT: Sustained. [466]

MR. SCHOENBERGER: I have no further questions at this time, your Honor.

THE COURT: I want to ask a few questions.

BY THE COURT:

Q How many recommendations were made by the Legislature or legislators to the County Attorney for the appointment of Assistant County Attorneys in December or January?

A I do not know. I do not even know how many Assistant County Attorneys there are. It is something I am not familiar with.

Q Were all of those recommendations considered at a Democratic Caucus prior to the time that they were made?

A No. The process was not that formal. We knew the total number of Assistant County Attorneys and Assistant Public Defenders that were available,and I believe the number was thirteen or fourteen. I do not recall. And I knew that we would be making that amount of more recommendations to the Public Defender and to the County Attorney for their appointments.

But I do not recall that this was done

Colman-

in one meeting. As a matter of fact, I am sure it was not done at one meeting where formal things were given to the chair- [467]
person and asking her to go formally with those recommendations. This was a process that probably took several weeks.

Q Well, was the end result of that process that recommendations for thirteen or fourteen appointments were transmitted by the chairperson to the County Attorney and to the Public Defender?

A I believe so.

Q Was each of those persons appointed by the County Attorney or by the Public Defender?

A I do not know.

Q Do you know of any recommendation that emanated from any legislator that was not acted upon in the way of making an appointment by either the County Attorney or the Public Defender?

A I do not have firsthand knowledge, but I did hear of some, yes. I have heard that some appointments were rejected by both the County Attorney and by the Public Defender.

Colman-

Q When there was any such rejection, was the person who submitted that name at the time, the legislator, asked to submit another name?

A I do not know. It would have been the same legislator or it would have been the town delegation, probably that would be asked to submit other names. However, I also [468]
know that if the County Attorney or the Public Defender wanted someone specifically who he knew to be competent and qualified, they let it be known that they wanted that person appointed. I know for a fact that appointments were made of people who the County Attorney and Public Defender wanted appointed.

It was not as though the Democratic Caucus was giving recommendations and the County Attorney and Public Defender had to take them.

Q Well, if the County Attorney or Public Defender wanted a specific person or persons to be appointed, would they submit those names to the democratic legislators and ask that someone sponsor them?

A Not quite that way.

The way I would explain it -- and this

is an assumption on my part -- if the County Attorney or Public Defender wanted someone appointed, he could either appoint them, or he could try to see to it that other people approved of it also.

I know in my own case if I wanted to make an appointment of soneone, it would be politically very smart to have that person recommended by a number of people. Why not? I want him, anyhow. I would like to see somebody else recommend him also. This is done all the time. It costs nothing, and it is a nice [469] gesture.

So, in that sense, yes. But it is not my impression it was required. As a matter of fact, when I stated to the reporter, I meant exactly what I said, that the recommendations that we will make will enable the Public Defender and the County Attorney to have a variety of names to choose from.

It has also been my impression that these people will have other sources, such as they know attorneys, likely they know people, they have business connections, and we would be only one source from which selections will be made. That is what I

told Mr. Seltzer in that portion of that article that Mr. Schoenberger tried to introduce as evidence.

Q Who are the political leaders in the Democratic Party in Rockland County?

A It depends on who you ask.

Q I am asking you now, and you are chairman of the Legislature --

A It is --

Q Let me finish, please.

I cannot imagine going to a more reliable source than you.

A Well, Rockland County does not have a political structure such as New York City. [470] We have a chairperson of the Democratic Party; we have chairpersons of every town; we have chairpersons of the villages.

However, they are not the bosses. They do not call the shots. There are no democratic leaders who can deliver the votes or who call the shots, and that is true of the republicans as well in Rockland County.

Even though we are in close proximity to New York City, we are different. And I really don't know how else to answer it.

Q Mr. Colman, this hearing has been

going on for quite a while now and there has been a great deal of testimony, and I have not yet heard how Mr. Branti happened to be selected to be Public Defender. Perhaps you can tell me.

According to your testimony, these are political appointments. I think you said the Public Defender and the County Attorney were political?

A Yes.

Q I would like you to tell me how Mr. Branti happened to be selected? What was the process through which he was selected? How did that process develop?

A As I testified before, there were several names that were more or less seriously considered. But there were other [471] positions that were considered, County Attorney, clerk to the Legislature, chairman of the Legislature, majority leader.

Rockland County consists of five different towns. We are elected. My district is the Town of Ramapo, and six of us run in this town. Another legislative district is Clarkstown, Haverstraw, Stony Point and Orangeburg. So it is a sort of fluid process whereby it is

known that one town cannot possibly control all the key posts, because politics in Rockland County is town oriented, we are elected through the town.

So, although I am chairman of the Rockland County Legislature, I am elected by the people of Ramapo. And although I am county oriented, because that is my duty, politics being what it is, it can be assumed that I would be most responsive to the people of Ramapo, because they elected me and they will presumably have an opportunity if I run for re-election to vote for me again.

The clerk to the Legislature is also a very sensitive position. County Attorney is also a sensitive position, and so is the Public Defender. Assistant to the chairman is also a sensitive position. It is known that a town cannot aspire to control more than usually one or two of these positions, because then it will give this town too much clout, too much [472] opportunity to do for their constituents at the expense, perhaps, of the constituents of another town. So it was never a question of having five or four or three candidates for Public

Defender and we voted on them. It was a question of having candidates for Public Defender, candidates for County Attorney, candidates for chairman, candidates for clerk to the Legislature -- not County Clerk -- County Clerk is an elective position -- assistant to the chairman.

And all these things had to be apportioned in a responsible, reasonable way, so that every township is satisfied that their interests will not be foresaken or sacrificed and their interests protected.

In Ramapo -- and that is the only place I can speak with personal knowledge -- we expressed an interest in the chairmanship and to keep the clerk to the Legislature. We automatically knew that when we did that that that alone was the most we could expect; when we made that decision we knew it would be highly unlikely that the County Attorney or Public Defender would come from Ramapo.

Now, that means that the six Ramapo legislators when they decided to back me for chairman and they decided to back Ms. Seigerman as clerk to the Legislature, knew that they probably, not for sure, but they

knew they probably were giving up any [473]
opportunity for naming the County Attorney and Public Defender. Why they did it? I know why I was seeking it. I do not know why the other Ramapo legislators supported me versus giving up the chairmanship and looking for County Attorney or Public Defender, but when they did that, they knew that it was very unlikely there was opportunity to have the County Attorney or Public Defender.

Well, that eliminated Mr. Schoenberger, Mr. Goodfriend and Mr. McAlevey.

Q It eliminated all of your constituents?

A Yes.

Now, the process could have taken a different shape if Mr. McAlevey or Mr. Schoenberger or Mr. Goodfriend had more support in the Ramapo Democratic Party within the Ramapo delegation. Then the delegation would have decided not to push me for chairman or not to push Mrs. Seigerman for clerk to the Legislature, but to concentrate on the Public Defender.

There was also a candidate for chairman from Haverstraw, and if we had pushed for

Public Defender, Mr. Grant would have had a better opportunity to be chairman. I hope I am making myself clear.

Q Well, at this stage you had, in effect, removed from many of the Ramapo [474] legislators any possibility of their suggesting their own candidate to either one of these positions of County Attorney or Public Defender?

A I did not do it.

Q The way the process worked, by a decision on the part of your co-legislators in Ramapo that you were going to be put up as candidate for chairman and Mrs. Seigerman was going to be put up for reappointment as clerk to the Legislature, that decision on the part of your constituent legislators was also a decision that they would not have their own candidate for County Attorney or Public Defender?

A That is correct, but if I am not presumptuous, I would like to point out that is likely what happens in any process.

If the Manhattan Democratic Committee is pushing someone for candidacy to the United States Senate, they cannot at the same time

push someone for Attorney General or for any other major position. These are the political facts of life, that there is a geographic distribution of these positions, and in Rockland County we do not have a centralized county government. It consists of delegations from different towns.

Q But now neither you nor your colleague legislators from Ramapo were [475] giving up any right to vote on who the candidate for appointment to Public Defender or to County Attorney would be?

A No. You are correct, sir.

Q Were you bound by the caucus so that you had to vote for the candidate that came out of the caucus?

A We had a gentlemen's agreement that any political decision that received eight votes would also receive the remaining three votes.

Q So, in effect, the selection of County Attorney and of Public Defender was a selection that was going to be made by the Democratic Caucus?

A That is correct.

Q What input was there in the Demo-

cratic Caucus, aside from the input by people who nominated or pressed various candidates? Were there other influences at work?

For example, the county chairperson? Were there other sources of power or recommendations with respect to these choices?

A I am not aware, no one approached me, except what was happening among those people in the Caucus. In other words, the county chairperson, yes, had an influence. This was discussed. There were names being talked about. The chairpeople of the various towns. I assume that if some elected [476] officials would call me, I would listen. But it so happens that I do not recall anyone. It was pretty much left to these eleven people, plus the political chairpeople of the party and the towns.

THE COURT: I don't have any more questions. Perhaps, Mr. Schoenberger, you might want to ask something more to clear up something I may have confused.

MR. SCHOENBERGER: No, I don't think you have confused anything. I think you have elucidated many things.

THE COURT: I don't want to urge that you should.

MR. SCHOENBERGER: There is one thing I would like to bring out on the record.

BY MR. SCHOENBERGER:

Q You recall the meeting of January 3, 1978?

A Yes, I do.

Q And your appointment of your administrative assistant, Diana Rivet?

A Yes, I do.

* [478]

MR. WAGNER: Your Honor, this is so outrageously leading I have to object. Mr. Schoenberger just told the witness what happened.

MR. SCHOENBERGER: It is in the transcript. I just want to highlight one item.

THE COURT: I will overrule that objection, but I suggest that we may be getting into an area where you should not be leading any more.

MR. SCHOENBERGER: Thank you, your Honor, for the suggestion.

Q Do you recall that?

A Yes, I do.

Q Do you recall also that democrats voted against that?

A Yes, I do.

Q And if I recall correctly, that motion to fix her salary failed?

A That is correct.

MR. SCHOENBERGER: I have no further questions.

REDIRECT EXAMINATION

BY MR. WAGNER:

Q Diana Rivet, before she was appointed assistant to the chairman, was the County Attorney for the last four years? [479]

A That is right.

Q Will you tell the Court why Mrs. Rivet was not continued on as County Attorney?

A I am not sure I know. I can tell you why I appointed her as my assistant.

Q Mrs. Rivet is from Orangeburg?

A That is correct.

Q Orangeburg did not elect any democratic legislators?

A That is true.

Q Mrs. Rivet did not get any sponsors for that position?

A I disagree, if I am allowed. That is not the reason.

Because I am from Ramapo, I appointed Mrs. Rivet as my assistant. this is the choicest job, the biggest plum I had to give away, and I didn't have to have anyone approve, and yet I appointed a woman from a different town as my assistant. This was done solely on competence.

Q Mr. Colman, wasn't this also done as part of a package whereby Ramapo would get the chairmanship and the clerk of the Legislature; Haverstraw got the Public Defender and the County Attorney; and in return, Mrs. Rivet was given this appointment as part of an overall political package? [480]

A Mr. Wagner, I am not embarrassed by the fact that there is an apportionment geographically. It happens. It is not true in this case.

I appointed her because I thought she was most qualified and would make me, as chairman, look good. This is a political decision I made, and I live with it. There were repercussions. Some people were happy, some not happy, but I have to deny this was part of a package. It was not.

I did testify that there were other

accommodations that were made to geography. This one was not.

Q Mrs. Rivet took a substantial cut in salary from County Attorney to your assistant, didn't she?

A I don't know what the substantial means.

Q Wasn't the County Attorney making about $29,000 a year?

A If that is the case, then she is making $25,000; she then took a cut of $4,000. Mrs. Rivet, I don't know what her personal ambitions are, but she was extremely pleased when I offered her to be assistant. Many people take monetary sacrifices.

To be a judge is a fiscal scrifice, yet there is a big line of people who want to be judges. People make decisions based on [481]
things other than money. Mrs. Rivet was very happy when I offered her to be my assistant.

Q Mr. Colman, didn't Mrs. Rivet want to continue on as County Attorney but could not because she could not get any sponsors?

A You will have to ask her. I could not answer that. I can tell you that

when I appointed her she was happy to be assistant to the chairman.

Q But she could not get sponsors and she was happy to get any appointment?

A I disagree with you, but if you want to debate it, I will be delighted to.

Q Mr. Colman, you indicated that the Public Defender and County Attorneys had the absolute right to make their appointments to assistants?

A That is correct.

Q And they didn't have to get the approval of the Democratic Caucus, but you indicated that it would be politically wise for Mr. Branti or Mr. Paris to have someone else sponsor these individuals as well?

A I never used the word "sponsor."

Q I withdraw "sponsor".

A And also I gave an example to the judge's question, that if I as an elected official had an opportunity to make an [482]
appointment of someone who I wanted, anyhow, but you wanted to recommend him, I would let you recommend him, even though you are not from the political party; it is good thinking to do it; it doesn't cost any-

thing; it creates good will.

Q If that is the case, then I can understand why certain county legislators would recommend certain names to the Public Defender; I can also understand why Mr. Branti or Mr. Paris might go to certain legislators and say, "Will you please recommend so-and-so."

Can you tell me why, in your opinion, one of the proposed Assistant Public Defenders would have to go before the Caucus and ask them please to sponsor him if he already had Mr. Branti's approval?

A I don't know of such an instance and I don't know why he would have to do it.

Q You indicated that Resolution No. 20 made at the meeting of January 3, 1978, was merely to authorize the Public Defender to hire such assistants as were provided for in the budget?

A That is correct.

Q Would you characterize that as more or less an implementing resolution.

A Well, obviously, it is not, because we didn't have a unaminous vote on it. [483]

Q Isn't is a fact, Mr. Colman, that

of the people present, the eleven democrats voted for this resolution and all of the republicans who were present, all of the republicans legislators, except Mr. Grogan, who was not present, all voted against it?

A That is a fact.

Q Mr. Colman, the Public Defender is considered to be a department head?

A I believe that is the designation, yes.

Q And the County Attorney, he is the department head, he is the head of the County Attorney's Office?

A That is correct. [487]

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I was telling him that I as chairman or as member of the Legislature, when I have an opportunity to vote, these jobs and my votes will not be based on politics, and since then and before then I have lived up to this credo.

Q Didn't you say that every political appointment that was being made that night were political appointments "They were recommended by the Democratic Caucus and I will vote for them"?

A And I was referring to the County

Attorney, the Public Defender, the clerk to the Legislature, the assistant to the chairman, and whatever other political things that we did, the Legislature and the chairman.

The Assistant Public Defenders are appointed by the Public Defender. The Assistant County Attorneys are appointed by County Attorney. I was not referring to those appointments.

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[489]

Q Didn't you indicate in your direct testimony before that you favored keeping on existing employees who were doing a good job?

A Who I was aware were doing a good job, yes.

Q Did you know, did you have any reason to believe that Mr. Tabakman was not doing a good job?

A that's not the way I reason. I have to know of someone doing a good job before I would recommend rather than the other way around.

Let me put it this way: Mr. Wagner, I really think that the Count wants to get to the bottom of this thing. I came here volun-

tarily and I truly want this thing to be clarified. This does go to how I feel and what I believe, and I believe the record shows this.

When I of firsthand knowledge knew of people doing an excellent job, when I had the opportunity to vote for them, I voted for them, regardless of party, and when there was opportunity to make recommendations, I did that too regardless of party.

I did not know Mr. Tabakman in any way, good or bad, and I was not going to make that recommendation, especially when this was given to me in exchange for a vote I did not need, and I felt demeaned by the request.

[490]

Q Aren't you primarily concerned, Mr. Colman, as a county legislator, with appointing the best and most qualified public servants for county positions?

A Yes, I am.

Q all other things being equal, don't you think that two years or seven years experience in an office makes someone relatively more qualified than another person who doesn't have that experience?

A Not necessarily so.

Q All things being equal.

A Not necessarily so. As a matter of fact, if I may, I would like to say this: The reason we have elections is we have opportunity to throw rascals out.

Now, the Public Defender we replaced did not enjoy a good reputation where my constituents were concerned. So I had absolutely no confidence in any of his assistants. I did not tell him who to keep, who not to keep, but basically, if Mr. Barone was looked upon with great respect by the people of Ramapo, regardless of what party they are, I would then consider what you say, yes.

This is why I am relunctant, and I stated to Mr. Dusanenko and I stated in this testimony, I would be very relunctant to vote against Mr. Weinberg, because he enjoys the respect of the people of the town I represent. [491] This was not true of the Public Defender's office.

Q Mr. Colman, when Mr. Barone was originally appointed to the position of Public Defender I believe you were on the Legislature at that time, or was that after

your election?

A I did not appoint Mr. Barone.

Q I'm sorry. I withdraw that.

Do you know whether it is not a fact that Mr. Barone at the time of his appointment was from the Town of Ramapo?

A I do not know that.

Q Are you familiar with Arnold Becker?

A Yes, I am.

Q Arnold Becker was the Public Defender prior to Mr. Barone, is that correct?

A That is correct.

Q Does Mr. Arnold Becker enjoy an excellent reputation in your community?

A In my opinion, yes.

Q Mr. Becker is a democrat, isn't he?

A That is true.

Q Were you aware of the fact that Mr. Becker appointed Mr. Aaron Finkel to that job originally?

A No, I did not. I was not aware.

Q Did you attempt to find out whether any of the existing Assistant Public De- [492] fenders, such as Mr. Tabakman and Mr. Finkel enjoyed the confidence of Mr. Becker, whom you respected?

A I did not, because these were not my appointments. I do not delve that deeply into other people's appointments. I just do not.

Q Mr. Finkel is a constituent of yours, isn't he.

A That is correct. he never requested for my support or recommendation.

Q When the positions of Assistant Public Defender became available did you make any effort yourself to canvass your constituency to find out who was available?

MR. SCHOENBERGER: I am going to object to that question, Your Honor. I think most of all of this has already been asked and answered, your Honor. We have gone through this on direct, we have gone through it on your Honor's questioning, we have gone through it on cross, now we are going through it again.

THE COURT: I am inclined to think that's right.

MR. WAGNER: All right, I will withdraw the question, your Honor.

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* [516]

(Hearing resumed)

MR. TABAKMAN: Your Honor, Mr. Wagner will be in in a moment.

THE COURT: Mr. Wagner, are you ready to proceed?

MR. WAGNER: yes, your Honor, we are.

At this time the plaintiffs call Mr. Robert Seltzer.

R O B E R T S E L T Z E R, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q Mr. Seltzer, I show you Plaintiffs' Exhibit 7 in evidence.

I ask you, Mr. Seltzer, are you a reporter for the Rockland County Journal News?

A Yes, I am. [517]

Q Were you the author of that article which bears your by-line in the December 24, 1977 issue of the Rockland County Journal News?

A Yes, I was.

Q You wrote that story; is that correct?

A Yes, it is.

Q Mr. Seltzer, I call your attention to the second paragraph of that exhibit which indicates and I quote:

"The selections were actually made by the Democratic Caucus composed of the party's eleven county legislators."

I ask you was that information given to you by some specific individual or was that your own interpretation of what happened?

A It was given to me.

Q By an individual?

A Yes.

Q I would like to ask you at this time who gave you that information?

A I respectfully decline to answer that question. The information was gathered for me when I was working on a news story. The news story ran and was published. [518]

The information was given to me confidentially and it was clearly understood between the person that gave it to me and myself that it would not be attributable to them.

MR. WAGNER: Your Honor, at this point I would respectfully submit that there are several avenues open to the Court, which we have discussed previously.

On behalf of the plaintiffs, I would be perfectly willing to have this Court adjourn in camera and for your Honor to elicit the information from the reporter to be kept confidential by your Honor and used only for your Honor's purposes in making a decision in this matter. Or, in the alternative, if that is not satisfactory, your Honor could, again in camera, question Mr. Seltzer to find out if the information he has is, in fact, pertinent and if it turns out your Honor feels it is not pertinent, then I would not press the point.

[526]

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I don't understand your argument at all.

MR. REDIS: My argument is that whoever made that statement --

THE COURT: your argument, apparently, is that I am not going to decide this case predicated upon an answer to this ques-

tion. I think that is probably a safe assumption, but the answer to that question, I am sure Mr. Wagner will say, may lead to an avenue of pursuit which has not previously been pursued.

MR. REDIS: I believe, your Honor, that the First Amendment does not yield to such a precarious type of answer like that. It has to be an overwhelming an compelling reason. Not maybe, not perhaps, and not hypothesis.

THE COURT: I think without even hearing from you, Mr. Wagner, unless you insist that I hear from you, I am going to rule on this.

I am not going to direct Mr. Seltzer to answer the question. Whatever the source of the statement, which appeared [527] in the newspaper article, whether it is accurate or inaccurate, whether the source was informed or uninformed or misinformed, the fact of the matter is that the plaintiffs in this case have had a complete opportunity to explore the truth or falsity or relative truth or relative falsity of the statement in that article in the course of

the presentation of their case by examining just about everyone who would have been in a position to know the facts.

This being so, the chances are quite good that an answer to this question, if compelled, would come up with someone who either has already been examined in the course of this action or could have been examined in the course of this action.

Now, perhaps it might be interesting to know who it was so that you could have some test of the credibility of at least one of the many witnesses who testified here, but I don't really think that that is a consideration which can be put into the balance of this case.

I really think we have reached the stage where the significance of an answer to this question is relatively slight compared to the very substantial constitutional considerations on the other side of the coin. [528]

I am not going to reach the constitutional question. I am just simply going to say that I shall not

require Mr. Seltzer to answer the question.

MR. WAGNER: Very well, your Honor. I am sure your Honor is aware of our position for the record and I will not restate it at this point.

THE COURT: I think your position is very clear. I think your position is that you are entitled to an answer to this question; that an answer to this question is quite relevant to your case and it is very important to exhaustion of every possible avenue of inquiry; and that there is no constitutional right of Mr. Seltzer to refuse to answer to answer either under federal law or under state law which outweighs the constitutional rights of your clients to present their case.

I understand your position and my ruling is made on the basis of that understanding.

MR. WAGNER: Thank you, your Honor. In that case, then, I would excuse Mr. Seltzer.

MR. REDIS: Thank you, your Honor.

MR. SCHOENBERGER: I have no questions of Mr. Seltzer, your Honor.

(Witness excused)

* [530]

THE COURT: You want this marked as an exhibit?

MR. WAGNER: Yes, your Honor, I do.

(Plaintiffs' Exhibit 14 received in evidence.)

MR. WAGNER: your Honor, the plaintiffs rest.

MR. SCHOENBERGER: Your Honor, I have two brief things to say.

First with regard to what Mr. Wagner just stated with reference to calling Republican legislators to testify, he made the assumption that they would all testify as Mr. Dusanenko testified. I am sure your Honor will give Mr. Wagner's testimony as to what the legislators would testify to the proper weight in this case.

The Second thing I would like to say is I would like to make a motion at this time to deny the preliminary injunction and the temporary restraining order and dismiss this case. There has been no proof that the plaintiffs suffered a loss of constitutional rights in this case.

There has been no proof of the Elrod v. Burns situation or facts.

All the plaintiffs have shown is that there existed a political system in Rockland County. We readily admit that, your Honor.

There has been ample testimony that the caucus, the democratic caucus made recommendations; that the Public [531]
Defender himself passed upon those recommendations, the Public Defender himself appointed people to this office.

When the plaintiffs originally obtained this temporary restraining order, they submitted affidavits and in their affidavits they stated they believe they had a right of expectancy in this job. The testimony from their own witnesses and from our witnesses showed that they served the pleasure of the Public Defender and there was, your Honor, we submit, no right of expectation.

Based upon all the proof that has been submitted thus far, your Honor, and since the plaintiffs have rested and

they are done submitting proof, we ask that this motion be granted, the preliminary injunction be dismissed, the temporary restraining order be dismissed and the summons and complaint in this matter be dismissed.

THE COURT: I will reserve decision on that motion.

MR. SCHOENBERGER: At this time, your Honor, we have subpoenaed Mr. Barone to testify and we would ask that he be excluded.

MR. WAGNER: No objection, your Honor.

THE COURT: I think we have an operative rule in the course of this trial that all witnesses or prospective witnesses are excluded. [533]

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Finkel-direct

A A R O N F I N K E L, resumed.

THE CLERK: You are still under oath, Mr. Finkel.

DIRECT EXAMINATION

BY MR. SCHOENBERGER:

Q Mr. Finkel, am I correct that you

were appointed to the Public Defender's office in approximately March of 1971?

A Late March, yes.

Q Can you tell me about your political background, political involvement in Rockland County at the time just before -- just prior to and at the time of your appointment as Assistant Public Defender?

A I and I believe my wife also had been committeemen for some time with the Ramapo Town Republican Committee. I believe we were considered County Committeemen.

Q Did you ever submit a resume to Mr. Becker prior to your being hired as Assistant Public Defender?

A Yes.

Q To the best of your knowledge, prior to your being appointed as an Assistant Public Defender, did any county legislators or anyone else active in the Republican Party in Rockland County go to Mr. Becker and speak to him on your behalf? [534]

A I don't know that for a fact, but I certainly wouldn't be surprised if some did.

Q Do you know if Mr. Clinton Dominick supported you in your attempt to obtain a position?

A D. Clinton Dominick I'm rather certain did not in any way come forward on my behalf for that position, although I am certain that if I had asked him he probably would have made a call for me.

Q Mr. Finkel, do you recall your previous testimony concerning your change of registration from Republican to Democrat?

A Yes.

Q Do you recall when you filed the application to change parties?

A It was sometime in February. My almost certain recollection is that it was sometime in February 1977.

Q Do you recall when it was to take effect?

A January 1, 1978.

Q Prior to your filing that change of registration in February of 1977, how long had you been a registered Republican?

A I would think about seventeen years, maybe somewhat less, but for quite some time.

*

[541]

Q Since you recall so specifically where it was, do you recall the time of day?

A It was light out. I remember it being cold. I think it was in the morning but, there again, it may have been afternoon. I'm not certain. It was light.

Q Do you recall at that conversation what you said to Mr. Branti and what he said to you?

A I told him I needed a job and he said it wasn't up to him or something like that.

Q Do you recall his exact words to you?

A Not with definite certainty. I could be close, but I couldn't be certain.

Q So, when you now testify that Mr. Branti said to you it wasn't up to him, that's your best recollection of the conversation, isn't it?

A That's a certain recollection. That I remember very definitely. That's something I did not forget.

Q Were those his exact words to you or weren't they?

[542]

A I don't remember his exact words. I remember the import of his words and that was precisely the import of his words.

Q That was your conclusion of the import of his words, am I correct?

A That is correct.

Q Do you recall having any other conversation with Mr. Branti after the November 1977 election?

A I probably spoke to Mr. Branti a number of times, perhaps on business of the office or otherwise, and I do recall Mr. Branti having testified and I believe his testimony in that regard.

MR. SCHOENBERGER: Once again, your Honor, I move to strike any reference to what Mr. Branti testified to by the witness.

THE COURT: He is adopting Mr. Branti's testimony.

I suggest we move along.

MR. SCHOENBERGER: Okay, your Honor, I will do that.

Q Do you recall having a conversation with Legislator Isaac Goodfriend?

A I had one telephone conversation that I have a very definite recall of. If

I saw Mr. Goodfriend around town, I probably had other conversations with him. [543]

Q That one telephone conversation that you have a good recall of, is that the one where you asked him whatever help he could give you in being reappointed assistant public defender?

A Yes, I said other things to him, but I did say that to him, too, yes.

Q What else did you say to him in that phone conversation?

A I said, "Ike, if you remember, I was appointed by Arnold."

I tried to give him some background and basis for helping me. Mr. Goodfriend knows me and I tried to in a few words, because it was a very short conversation, I tried to give him some of my credits so he could push for me.

Q Do you recall offering Mr. Goodfriend the opportunity to place a sign, his campaign sign, a political sign on your lawn?

A I very definitely did do that.

Q Excuse me, you very definitely did make the offer, am I correct?

A Yes.

Q Did Mr. Goodfriend accept the offer? [544]

A No, he didn't accept or decline. He said "Thank you," but never asked me to do that for him.

Q Mr. Finkel, were you ever involved with determining the eligibility of an indigent in the Public Defender's Office?

A In a way, yes.

MR. SCHOENBERGER: May we approach the bench, please, your Honor?

THE COURT: Yes.

(At the bench.)

MR. SCHOENBERGER: Your Honor, all I want to say to your Honor is that I am about to approach an area that we have discussed and that you requested that the attorneys approach the bench prior to entering into any testimony in open court on.

THE COURT: Tell me in substance what you plan to do, Mr. Schoenberger.

MR. SCHOENBERGER: I intend to examine his eligibility and ineligibility for the Public Defender's office.

MR. WAGNER: Would it be better to go in chambers, your Honor?

MR. SCHOENBERGER: There was testimony January 6th of who made the determina-

tion of eligibility and very definite [545]
statements by the witness in that regard.
I am going to ask him if he ever represented eligible indigents in his private practice while he was a public defender.
I intend to ask him whether he ever represented ineligible indigents.

THE COURT: Will you tell me what that has to do with the issues in this lawsuit?

MR. SCHOENBERGER: Your Honor, Mr. Finkel, through both his papers and his testimony, has attempted to bring out to this Court that he is competent to be an assistant public defender and that he was doing his job competently.

I intend to bring out testimony to show that both of those things, and this will be a court determination, of course, are not true.

I think it is very relevant to the issue of competence if there are violations of statutes involved --

THE COURT: The issue of competence only comes in here to the extent that Mr. Branti knew about his competence

or incompetence and took it into consideration as a factor in making a decision.

Mr. Branti has already testified that he regards him as competent. That testimony, so far as I can see, makes [546]
any testimony with respect to incompetency irrelevant because it is your position, as I understand your position, that the selection was made by Mr. Branti.

Unless you are taking the position that Mr. Branti has previously lied to this Court, I rule now that any testimony along the lines that you are suggesting, strictly testimony with respect to matters that did not come to Mr. Branti's attention and at the time that he made a decision not to appoint this man as a public defender is irrelevant.

MR. SCHOENBERGER: If your Honor pleases, there is also testimony by Mr. Barone concerning the operations of his office, concerning what is or rather what would be a conflict of interest in representing criminal defendants in a private practice. Those stages of the transcript are within the memorandum of law that we submitted to the

Court. This relates directly to the credibility of Mr. Barone, one of their best witnesses, and it relates directly to the credibility of Mr. Finkel, a plaintiff in this case.

I therefore must take exception to your Honor's ruling. I think it is very much admissible.

THE COURT: now you have changed your argument. As I understand it, you are..now arguing that it is admissible, not on the grounds of relevancy but on the grounds of it being relevant to the man's credibility. [547]

MR. SCHOENBERGER: In our memorandum of law that we submitted to you, there were four or five grounds or conclusions that we put in our memo as to why we felt the various testimony would be admissible. One of them dealt with the credibility of Mr. Finkel and the other one dealt with the credibility of Mr. Barone.

We have Mr. Barone in the hall waiting to be called as a witness and we intend to call him as our next witness. Mr. Apotheker will be examining him, but I think we'll be going into this same area at that time.

Once again, if your Honor recalls

Mr. Barone's testimony, his testimony was very specific as to what instances an assistant public defender could represent a client in private practice. The evidence that we will adduce will go directly to that credibility, directly to the running of his office.

There has been other testimony concerning the competence and the reputation of Mr. Barone in his office. I believe Mr. Colman testified just last Wednesday that he did not believe that the Public Defender's Office enjoyed a good reputation.

It was in reference to a question concerning Mr. Tabakman. I believe he was asked whether he passed on the request by [548] Mr. Dusanenko or recommendation to the caucus of Mr. Tabakman and he said he did not. One of the reasons he answered that question that way, it is my recollection, had to do with the reputation and competence of Mr. Barone's Office. Mr. Finkel is also within that office.

THE COURT: Let's talk about Mr. Finkel for a minute. You say that this evidence which you seek to elicit should be ad-

missible because it affects Mr. Finkel's credibility.

What has Mr. Finkel testified to which contradicts in any way what either Mr. Branti has testified to or anybody else has testified to in this case?

MR. SCHOENBERGER: If your Honor will allow me, I will get the transcript from January 6th and you can see that Mr. Finkel, as I recall, testified that in no way whatsoever did he have anything to do with determining eligibility in Mr. Barone's office. He called Mr. Barone a dictator. He said those matters were solely determined by him.

THE COURT: I remember that.

MR. SCHOENBERGER: Now he says he did have involvement in determining eligibility. That was the last question I asked and that is when I approached the bench. [549]

I think that I should be able to explore the method of eligibility with reference to persons who come to the Public Defender's office for assistance, and Mr. Finkel's involvement in it, if any.

THE COURT: Mr. Schoenberger, I

am going to give you a warning and I want you to pay very close attention to the warning.

MR. SCHOENBERGER: Yes, your Honor.

THE COURT: We are dealing in this case with a substantial question of constitutional law in a developing area. There is no question in my mind but that ten years ago this question of constitutional law probably would not have been presented to any court.

You have an obligation as an officer of this court, just as Mr. Wagner does, to present this issue of law cleanly and it is no way to present it to go out scrubbing the woods of Rockland County for what dirt you can find on the plaintiffs in this case, particularly if that dirt is not relevant to the issues.

Now, I am very much concerned that what you want to go into reflects that sort of scurrying around to find some skeletons in various closets which might be very, very relevant if Mr. Branti had made decisions predicated on knowledge of those skeletons, [550] but he has testified he didn't.

So, I'm not going to make a ruling

in advance on the questions you are about to ask, but I am going to take a half hour recess at this point and I am going to ask you to consider with your client and with your cocounsel very carefully what your obligations are in this situation.

It may very well be that this case, however it is decided, will be upped two more steps and you and counsel for the Plaintiff are going to go up with it as part of the record, if not as counsel, and I just want to be sure that you go up in a posture that you will be proud to go in.

So, I am going to leave it at this stage. We will take a half hour recess.

MR. SCHOENBERGER: Thank you very much, your Honor. I understand what you are saying to me and I appreciate it. Thank you.

(Recess.) [551]

(In the robing room)

THE COURT: Immediately before we took a recess, I had a bench conference with Mr. Schoenberger and Mr. Wagner, and Mr. Schoenberger has now said that, having spoken to Mr. Wagner, he would like to continue the discussion that we had prior to the recess in chambers, and here we are.

Mr. Schoenberger?

MR. SCHOENBERGER: Your Honor, we discussed this in the hall, and I explained it to my co-counsel and the defendant, both of whom, as you know, are attorneys, and we took special regard to your Honor's words, being attorneys, and the words coming from your Honor, from this Court.

We felt, after discussing it, that perhaps rather than proceeding the way we had originally intended with Mr. Finkel and then Mr. Barone, we perhaps should excuse Mr. Finkel at this time, subject to cross-examination on what has already been asked, and proceed directly with Mr. Branti.

Depending on Mr. Branti's testimony, the cross-examination that flows from it, we would like to then either make a suggestion to resolve this matter at that time or proceed. [552]

Once again, this is a determination we will have to ask the Court to make at that time.

THE COURT: Is that satisfactory, Mr. Wagner?

MR. WAGNER: I have no objection, your Honor, with the provisio that should

we get into a sensitive area, counsel will approach the bench, because a sensitive area could arise during the questioning of Mr. Branti as well as Mr. Barone or Mr. Finkel.

THE COURT: The sensitive area could be gotten into through Mr. Wagner as well as through Mr. Schoenberger.

MR. SCHOENBERGER: Your Honor, I believe we advised the Court that there was other evidence that would be forthcoming that would also be of a damaging nature. We did not make an offer of proof as to that evidence, your Honor. It is all, as I recall, evidence that existed prior to Mr. Branti making his determination as to this appointment as a Public Defender and which he is prepared to testify he knew about and took into consideration.

*

[556]

Branti-direct

"Q You have conceded, I believe, without question that Mr. Tabakman and Mr. Finkel are competent attorneys and were properly performing the functions of their jobs at the time you took office; is that correct?

"A I think I said that I thought

Branti-direct

they were competent attorneys. I never made any indication on whether they were properly performing their functions as Assistant Public Defenders."

Do you recall that answer?

A Yes, sir.

Q Mr. Branti, did you appoint the Assistant Public Defenders?

A Yes; I did.

Q What qualities did you look for when you appointed your assistants?

A Well, the first quality I looked for was someone that I knew, someone that I trusted. I looked for people that I could work with, people that I could train to my way of thinking. I looked at their experience. That was not the sole issue or determining factor that I used, but it was important.

I was interested in whether any person that I appointed, if they cared about people. In my opinion, that basically is the qualities that I was looking for.

[557]

Q Did you review the existing staff of the Public Defender's office before you made your final determination?

A Yes; I did.

Q And did you make personal observations about the members of the Public Defenders office while you were an Assistant District Attorney?

A Yes; I did.

Q What were those personal observations?

A Whom are we talking about now?

Q About Mr. Tabakman.

Did you personally observe Mr. Tabakman as an Assistant District Attorney while you were an Assistant District Attorney and while he was an Assistant Public Defender?

A Yes, sir. On a limited basis. I did not see him every day. I have seen him make bail applications; I have seen him on conferences. I did have the opportunity to pick or select a jury with Mr. Tabakman on a particular case that we had.

Those were my personal observations.

I also discussed him from time to time -- and I don't mean in this particular instance -- with members of the District Attorney's office. [558]

Q What was your impression of how Mr. Tabakman conducted himself as an Assistant Public Defender?

A Well, I indicated on January 6, when I testified, that I thought he was a competent attorney. I still believe that he is a competent attorney. I believe he showed great promise. I will say that for him.

However, I don't believe he was ever really interested in being a criminal lawyer. My observations of him are simply that he was at least interested to get back to his private practice as he was with whoever he was dealing with firsthand.

Q Did you believe that he had the qualities that you were looking for regarding caring about the people he represented?

A Well, he never indicated to me in any particular case or gave any indication that he didn't. I just didn't see it in him when I had an opportunity to observe him.

Q Did you have any discussions with regard to Mr. Barone's staff with Mr. Feinberg and Mr. Nelson?

A Yes. We had discussions, primarily with Mr. Feinberg.

Q What did you discuss with Mr. Feinberg about the existing staff? [559]

A The first thing we were interested in, naturally, when I spoke with Mr. Feinberg, we do handle a great deal of minorities in the Public Defender's office. There was no question in my mind that Mr. Nelson was an extremely competent attorney. He was also a black attorney. We felt it was incumbent that if Mr. Nelson desired to stay on in the Public Defender's office we wanted him to stay on. I wanted him to stay on in the Public Defender's office.

We also -- we discussed Mr. Sanchez. He has a Spanish name. He is Philippino, and I believe he's Spanish-speaking, and again, from my particular home town, there is a great Spanish population, and we thought it was important to have Mr. Sanchez stay, although at that point I had not made any decision on whether or not he would.

He did have an excellent reputation among the Assistant District Attorneys as being very, very tenacious. As a matter of fact, he was by many of the Assistant District Attorneys disliked because of that particular attitude that he had.

Q Did you discuss the staff of Frank Barone with Mr. Barone?

A Yes; I did. [560]

Q Did Mr. Barone know that you were keeping Mr. Nelson?

A Yes; he did. When he originally asked me to come in and sit down with him, I suggested to Mr. Barone that I wanted Mr. Nelson present when I spoke with him, because Mr. Nelson was staying on, and Mr. Nelson was his chief assistant.

He suggested to me that we would have a series of meetings, but at the first meeting he would prefer not to have Mr. Nelson present.

I didn't agree with it, but he mentioned it a few times, so that in fact on the first meeting I did speak with Mr. Barone alone.

* [565]

THE COURT: Well, to the extent that is an objection, I will overrule it, Mr. Wagner.

Read the question.

(Question read)

A No. He didn't say why he was blaming the District Attorney for his troubles, but it's been my opinion and my observations of Mr. Barone since 1974 --

THE COURT: Objection sustained.

Q Did Mr. Barone recommend Mr. Tabakman --

THE COURT: Everything in the last answer from "but" on will be stricken.

Mr. Branti, please listen to the questions and answer the questions and don't volunteer.

Q Did Mr. Barone recommend Mr. Tabakman?

A Yes; he did. he asked me if I intended to keep Mr. Tabakman on. I believe I said I hadn't made any decision on any members of his staff at that point. I did ask him if Mr. Tabakman was still a member of the partnership of Freedman, Wray, Wagner & Tabakman.

Mr. Barone indicated that he was, but he didn't see any problem with it. I said, "Well, I see a problem. That's your opinion," or words to that effect.

Q Did you ask him if Mr. Sanchez was still with the firm? [566]

A Yes. I believe the next recommendation was for Mr. Sanchez, after Mr. Tabakman, and I asked, "What is Mr. Sanchez'

situation with the firm? Is he a partner?" He said, "No. I don't think he's a partner. He does have an association, although it merely be a space agreement. He wasn't sure.

Q Did Mr. Barone recommend Mr. Finkel?

A Yes. I'm trying to do it in the order in which he made the recommendations to me. After Mr. Tabakman, yes, the next individual he recommended to me was Mr. Finkel.

Q What did he say about Mr. Finkel?

A That he was reliable. He said, "You had an opportunity, you know Aaron. He's a nice man, not the greatest lawyer in the world, but he's a reliable attorney."

Q Did he recommend anybody else?

A Actual recommendations; no, sir.

Q But the first and foremost recommendation was Mr. Barone; is that correct?

A That's right.

Q Mr. Branti, what criteria did you use in seeking the reappointment of Messrs. Nelson, Sanchez and McAlevey?

A First of all, they were in my opinion competent, very competent attorneys. [567] Mr. Nelson was a fine trial attorney. I had worked with him in the District Attorney's

Office a few years prior to that. There was no question he cared about people.

I trusted Mr. Nelson, had confidence in him.

As far as Mr. McAlevey is concerned, he was the workhorse of the Public Defender's Office, from what I could determine from my observations of him.

Q And Mr. Sanchez?

A And Mr. Sanchez, again, because of his name, his appearance, the fact that he had the reputation in the District Attorney's Office as being very, very tenacious on every case that he handled. I knew he cared about people. I had seen him a number of times at the Human Rights Commission, representing not only the Public Defender's Office but I believe it was the Filipino Home Owners Association, or some group such as that, and I was impressed with him at those particular meetings.

Q Going with him over the list of your appointments, what criteria did you use when you appointed John Costa and so on?

A I knew John. I went to law school at St. John's University at night. John was a New York City police officer who attended the evening

session. He was one year ahead of me. [568]

John was the youngest man to make sergeant in the history of the New York City Police Department. At least that's what I had been told.

I was impressed with him. When I left law school, I went into the District Attorney's office. When John left law school he went into the Special State Prosecutor's Office. I met him at a number of seminars or workshops after law school while he was in the Special State Prosecutor's Office.

He was Italian. That played a factor in it. As far as I knew, I was the only Italian attorney in Rockland County working for the government.

Q What about Mrs. Lorna Bernard?

A Mrs. Bernard -- I believe I met her three or four years ago. She was running in a primary, I believe, for Family Court Judge. I knew she had been a judge or an acting judge in the Town of Orangetown, in one of the hamlets. I had seen her on a number of occasions handling criminal matters, and Mr. Feinberg and I had discussed previously that we wanted at least one woman on the

staff of the Public Defender's Office, particularly for the Town of Clarkstown.

Q Why the Town of Clarkstown? [569]

A Because most of the major shopping centers are in the Town of Clarkstown. They handle -- I would say it must be thousands of cases of shoplifting. A good portion of those individuals are females.

Q What about Wayne Feinberg? What criteria did you use when you appointed Wayne Feinberg?

A First, Wayne Feinberg was one of my closest friends. I worked with Mr. Feinberg in the District Attorney's Office in '73 and '74, I believe. He then left to go to the County Attorney's Office.

In my opinion, he is an excellent criminal attorney, a close friend, someone that I could confide in.

Q And trust absolutely?

A Absolutely.

Q How about John allison?

A I met John Allison -- excuse me. I shouldn't say I met John Allison. I met John Allison while he was a member of the District Attorney's office. He was a young

man with no kidneys, and he was trying to establish a law practice. Three nights a week he went on a dialysis machine. And I was impressed with him, and I went to the District Attorney and asked him if he would hire John Allison that I would take the responsibility for Mr. Allison if he could not keep up because of his health problems, [570] and the District Attorney hired him.

I broke him in at the grant jury system. He then went on to become an attorney and an assistant district attorney in the lower courts, after a -- probably an eight-month period of working with me in the grand juries.

It reached a point where John couldn't keep up with the work load. He had had two kidney transplants, and neither of them took, so to speak.

I believe it was April or May of 1977, I was in the District Attorney's office, speaking with the DA, and Mr. Allison asked if he could come in to speak with us. He indicated at that point that he wanted to leave the DA's office and perhaps get a job in the Public Defender's office if there were one available. I don't know at that time if there was.

I asked John at that point with the DA present if he would stay until the end of the year, that I intended to seek the position of Public Defender, that if I got the position he certainly would come with me to the Public Defender's office, and if I didn't, I would personally make every effort to attempt to have him receive an appointment in the Public Defender's office.

He agreed to stay on, and I in fact appointed him. [571]

Q How about Gerald Blumenfeld?

A I have known Mr. Blumenfeld for a number of years. In my opinion he is an excellent attorney. He is a Certified Public Accountant. He is a former Village judge or justice. I believe it was July or August of 1977 I was making a speech at the Haverstraw Rotary Club. Mr. Blumenfeld had been a member, was a member -- is a member of the Haverstraw Rotary Club. I was speaking of the state of the criminal law in Rockland County and the operation of the District Attorney's Office.

After lunch, after I had given my speech, we sat around and had a drink or two. He asked me what my plans were, if I were going

to continue in the District Attorney's office. I said "No. I hope to be the Public Defender in Rockland County," and asked him at that time if he might be interested, and he said he would certainly give it some consideration, and I in fact appointed Gerald Blumenfeld.

Q And what about John McCabe?

A John McCabe, sir, is a very dear friend of mine. I've know him all my life, known his family. I grew up with John McCabe.

John McCabe left the practice in the City of New York about three years ago, when his father passed away -- I would say about [572] two years ago -- to run the family business. He is the editor of a newspaper. He is an extremely competent writer and a brilliant legal mind.

I know Mr. Feinberg spoke to me once or twice about Mr. McCabe. I believe Mark Parris spoke to me once about Mr. McCabe. Mr. McCabe was in fact recommended by the Caucus, and I appointed John McCabe.

Q Did you trust John McCabe?

A Absolutely.

Q Mr. Branti, as an Assistant District Attorney, were you aware of the number of in-

dictments disposed of by the Public Defendet's office?

MR. WAGNER: Objection.

THE COURT: Overruled.

A Yes; I think so. In 1977, the Public Defender's Office disposed of 115 felony indictments, and out of those 115 felony indictments only seven people exercised any constitutional rights whatsoever.

Q Mr. Branti, as a result of your experience as an assistant district attorney, was Mr. Finkel properly performing the functions of his office as an assistant public defender?

MR. WAGNER: I object, your Honor. He said he was competent, I believe that disposes of the question.

* [574]

THE COURT: To the extent that those examples are elicited on direct, you are going to have an opportunity to cross-examine him on them.

I will overrule the objection.

THE WITNESS: Would you read the question?

THE COURT: Mr. Stenographer --

(Question read.)

THE COURT: I believe you should more precisely limit the question.

MR. APOTHEKER: Prior to assuming his duties as a public defender. That is my question.

THE COURT: All right.

(To the Witness) Do you understand the question?

THE WITNESS: Yes; I understand the question.

THE COURT: All right. Go ahead.

A I observed Mr. Finkel since 1973 in the County Court, at conferences. I have read some preliminary hearings that he has conducted in the local courts prior to the cases going into the grand jury. In my opinion, I don't believe he was properly performing his functions as an assistant public defender, had he worked for me. He may very well have been properly performing in Mr. Barone's view, but [575] not mine.

Q Did you believe you could trust Mr. Finkel?

A No.

MR. APOTHEKER: Your Honor, may we approach the bench?

(At the bench.)

MR. APOTHEKER: Your Honor, we are going to get into an area now that has nothing to do with the offer of proof but is an example of why Mr. Branti did not feel he could trust

Mr. Finkel, and it has to do with the time that Mr. Finkel violated what Mr. Branti thought was a confidence of Mr. Finkel's office.

THE COURT: Was this something that happened prior to December of 1977?

MR. APOTHEKER: Yes.

THE COURT: And that came to Mr. Branti's office prior to December of 1977?

MR. WAGNER: I won't object at this time, your Honor. I don't know where we are going, but --

THE COURT: All right.

MR. APOTHEKER: If I could just have a moment, your Honor.

There will also be, along the same lines of trust, testimony regarding Mr. Finkel's representation of a client as a [576] public defender with Mr. Branti on the other side that Mr. Branti knew about and of course knew about because he was the assistant district attorney.

I just want to make that clear.

THE WITNESS: Why do we have to put it on the record? I don't want to kill anybody.

THE COURT: Just one second, please.

Mr. Branti, you have two lawyers here. They are both very good.

MR. SCHOENBERGER: Thank you, your Honor.

MR. FINKEL: Your Honor, I believe I am aware of what Mr. Branti and his attorney are referring to, and I am perfectly willing to address myself to the issue. The press is present, and although I believe the incidents are meaningless and well meaning and could be explained, I would prefer that it be done in the absence of the press.

THE COURT: How much longer do you think that you are going to be on direct examination?

MR. APOTHEKER: I think we should finish it up before lunchtime. Possibly not. I believe we have a half hour or 45 minutes.

THE COURT: is there anything else that you want to cover?

MR. APOTHEKER: At the bench, your Honor? [577]

THE COURT: No, before we take this testimony in camera, in chambers.

MR. APOTHEKER: there could be other testimony in camera.

THE COURT: My thought was if we went on with the material that is not covered by this bench conference and adjourned at one o'clock, we could take up the other point in chambers.

MR. APOTHEKER: All right, your Honor.

(In open court.)

BY MR. APOTHEKER (Cont'd):

Q Mr. Branti, I show you a copy of the New York Bar Association opinion regarding whether it is permissible for a town Justice and an Assistant Public Defender to be partners and ask you if you have read that opinion.

MR. WAGNER: Excuse me, Mr. Apotheker. Is that the opinion that was attached to your papers?

MR. APOTHEKER: yes, sir.

A Yes. I remember it.

MR. APOTHEKER: Your Honor, at this time I would like to formally introduce this in evidence. I believe we had made the affidavit part of the record, but I would like to have this marked as an exhibit.

THE COURT: Just a minute. I am not sure I understand the testimony you [578]

have just elicited.

MR. APOTHEKER: I asked Mr. Branti whether he read this opinion.

THE COURT: When did you read it, Mr. Branti?

THE WITNESS: The early party of January. I was aware of the opinion.

THE COURT: What is the relevance of it?

MR. APOTHEKER: Your Honor, I am just offering it at this time. It could have been offered at any other time. It was part of the affidavit, and I do want to offer it as an exhibit for the record.

THE COURT: You are not offering it as being in any way relevant to the testimony? Since he read it in January, it would seem to me it is a matter of complete indifference as far as I am concerned.

MR. APOTHEKER: I want to ask Mr. Branti if he had an opinion other than the opinion of the Bar Association.

MR. WAGNER: No objection, your Honor.

(Defendants' Exhibit C received in evidence.)

Q Mr. Branti, I believe you testified that you did not read that Opinion until some time in early January 1978. What was your opinion regarding an assistant public defender and a town Justice could properly be law partners? [579]

A In my opinion it would be a conflict of interest.

Q Did you hold that opinion prior to 1977?

A Yes; I did.

Q And did you have a conference with Mr. Barone in which you told him about that possible conflict of interest regarding Mr. Tabakman?

A I didn't say it was a conflict of interest when I spoke with Mr. Barone. I asked Mr. Barone if Mr. Tabakman was a partner in Freedman, Wray, Wagner & Tabakman. He said, "Well, if he is, that's no problem." I said, "That's your opinion."

Q Did you at any time foresee a problem?

A Certainly.

Q And do you foresee a continuing problem in your office regarding that conflict of interest?

A Oh, I certainly see a problem, in that the Bar Association has indicated that it is a conflict of interest. I am forced to keep Mr. Tabakman on my payroll. He is a member of my staff at this point, while he is not handling any cases. Judge Wray is sitting in the town of Clarkstown, and he is also aware of the ethics opinion of the Bar Association. I see a problem with any case in Clarkstown and in particular any case that is pending before Judge Wray? [580]

Q Mr. Branti, I show you this opinion of Judge Gagliardi, plaintiffs' Exhibit 11 in evidence, and ask you if you would read that opinion.

(Pause.)

A Yes, sir.

Q After reading that opinion of Judge Gagliardi --

A I didn't read the second page. Excuse me.

(Pause.)

Q After reading that opinion of Judge Gagliardi, in the Ninth Judicial District, did this opinion of the Ninth Judicial District in any way change your mind or change your opinion

regarding your feelings as to whether it was a conflict of interest for Mr. Tabakman and Judge Wray to be law partners if Mr. Tabakman was an assistant public defender?

A No. My opinion has nothing to do with the Bar Association opinion. It doesn't change my opinion.

MR. WAGNER: I ask that anything except "It doesn't change my opinion" be stricken.

THE COURT: It will be stricken.

Q Does this opinion of the Ninth Judicial District in any way change your opinion -- [581]

THE COURT: Isn't that the question you just asked?

MR. WAGNER: That was my objection, your Honor.

THE COURT: You objected to something in the answer.

MR. WAGNER: My objection to this question was going to be that the witness just answered the question.

THE COURT: Very well. The witness has just answered the identical question.

Let's move along.

Q Mr. Branti, was Mr. Tabakman in your opinion properly performing the functions of an assistant public defender?

A In my opinion, no.

Q And did you reach that opinion prior to or during December of 1977?

A It was my opinion of him in '76 and '75, also.

Q Why did you have that opinion?

A My main reason for it was simply that he was more concerned, in my opinion, with his private practice than he was with the defendants he was representing.

Q Did you feel that there may have been an improper relationship between the Public Defender's office and the law firm of Friedman, Wray, Wagner and Tabakman? [582]

A Yes. I so testified on January 6th.

Q Were you aware of approximately how much money in salaries went from the County to that law firm?

MR. WAGNER: Objection, your Honor, on two grounds. First of all, the money did not go to that law firm. These were individual employees of the County. Second, this question was raised on January 6th. It is a matter of

arithmetic. We can stipulate to the salaries of public defenders for the last several years. I don't see the relevance of it, but we can certainly agree on the mathematical quantity.

MR. APOTHEKER: I asked if he was aware, your Honor, in December of 1976.

THE COURT: Overruled.

(To the Witness) Were you aware in 1977 and 1976 how many persons in the Public Defender's Office were members of law firms?

A Yes; I was.

Q Did you trust Mr. Tabakman?

A He seemed trustworthy. Let me put it that way. There was one personal incident, that I do not wish to discuss, that affected my opinion of Mr. Tabakman.

MR. APOTHEKER: Your Honor, at this time I request that we adjourn. [587]

*

A I met Mr. Dusanenko, I believe, at a breakfast for Mr. Zebrowski probably the middle of the month. At that point he congratulated me. He heard that I was going to be nominated by the Democratic Party for

Public Defender. He asked me if I would keep Mr. Tabakman on in the office. I indicated to him at that time that most of the decisions had been made. There were some limited positions left. I was waiting to see what recommendations were being made to me by the Democratic Caucus before I made any further decisions.

At that point I mentioned an individual by the name of Bill Butera. And I asked him if he knew him. He was also a Clarkstown resident. Mr. Dusanenko was very adamant on that and said "Butera has a job, I'm not concerned about Butera. I'm only concerned with those that haven't. I want Tabakman to stay in the office."

He got quite adamant about it. At one point in it he said to me, "The fucking Jews from Ramapo want to run the whole county."

Q Those were his exact words?

A They were his exact words. "You go tell them that you need twelve votes before you can have any bonding resolution. If I don't get Tabakman, I'll make sure that they don't get the twelve votes in the Legislature."

[589]

Q Did you speak to Harriet Cornell, Democratic Chairperson?

A Yes, I did.

Q What was the conversation or conversations you had with Mrs. Cornell?

A I believe the first conversation I had with Mrs. Cornell was early in December. She called me one morning at the District Attorney's office and indicated to me that I would be the Democratic nominee for Public Defender.

At that point I indicated to Mrs. Cornell that I was pleased and I was happy with the position. I realized I had not been elected to the post, and I wanted the Democratic legislators to have some input into the office, but I wanted her to make it clear to anybody she spoke to that in the end I would make the appointments regardless of who was recommended to me, I would decide who would be appointed.

Q Of all the people that were mentioned, all of the legislators and political people, it is your testimony that the only one who pressured you in any way to appoint anyone was Legislator Dusanenko with regard to Mr. Tabakman?

A Yes, sir. [591]

(In the robing room.)

THE COURT: So the record indicates what we are doing here, Mr. Apotheker indicated this morning that he had some sensitive areas that he wished to examine Mr. Branti with respect to and suggested, and Mr. Wagner agreed, that the examination should take place in chambers.

Mr. Wagner has indicated that he would prefer to have the entire direct examination, including the examination into these sensitive areas, covered before he begins his cross.

So, since Mr. Apotheker has indicated that the non-sensitive portion of the direct examination is completed, why we are ready to proceed with the sensitive portion of direct examination.

BY MR. APOTHEKER:

Q Mr. Branti, I believe you testified earlier on direct examination that you felt Mr. Finkel was not properly performing his functions as an Assistant Public Defender?

A That is correct.

Q Were you aware, prior to assuming your duties as Public Defender, of a time that Mr. Finkel violated the confidence of his office?

MR. WAGNER: Objection, your Honor, as leading. [592]

THE COURT: I will overrule that objection but caution you that I don't want any more leading, Mr. Apotheker.

MR. APOTHEKER: Yes, sir.

A Yes, sir.

Q Could you tell the Court about the time that you felt Mr. Finkel violated that confidence, and what that confidence was.

A Yes, sir. It was sometime in the late summer or early fall.

Perhaps I can clear it up. In Rockland County, your Honor, on our calendars, you have a number and a defendant's name and a chart. Under the number it indicates the Assistant District Attorney that is handling that particular case.

In Rockland County Mr. Gribetz, who was the District Attorney, does handle cases on a personal basis. He does take them and he will try the cases.

His name appeared on a file and appeared on a calendar, and the case, I believe, was assigned by the Public Defender's office to Mr. Finkel.

For some reason, in my opinion if everything that was told to me was true, it was foolish --

MR. WAGNER: Objection, your Honor, [593] as to what was told to the defendant unless he can show some relevance and who told him.

THE WITNESS: It concerns Mr. Finkel.

THE COURT: Just one second, please.

The testimony that we are getting from Mr. Branti, I take it, is to indicate what was known to him as of the time he was appointed Public Defender and had the problem of choosing Assistant Public Defenders, and whether it was told to him or whether he read it in the newspaper or whether he imagined it, if it was something that he drew on in making appointments, it seems to me it is relevant.

I will overrule the objection.

A In any event, Mr. Gribetz, I believe, started to prepare the case for trial.

THE COURT: Is this something Gribetz told you?

THE WITNESS: Yes, sir.

MR. WAGNER: Your Honor, in that case I have to renew my objection. It is hearsay. If Mr. Gribetz wants to testify to it, that's perfectly all right.

THE COURT: Mr. Gribetz wasn't making the decision; Mr. Branti was making the decision, and whether it is true or not at this stage is not really very important. It's what this man, this witness, had in his mind at the time that he made these decisions that is significant. [594]

I will overrule the objection.

A As I stated, Mr. Gribetz began preparing the case for trial. Mr. Finkel approached Mr. Gribetz and said, "My office is attempting to set you up. My name appears on the file, but at the last minute, when you go to court, one of the other Assistants is going to come into court and try this against you."

Whether or not that was true, I thought it was quite foolish, but what bothered me about it is that if, in fact, it were true, Mr. Finkel, I know, did come to see Mr. Gribetz

about it, if he would do this to Frank Barone, who he worked for for six years, I was sure he would do it to me on a moment's notice.

That was one of the determining factors that I used to consider Mr. Finkel.

Q As a result of that occurrence, did you have a feeling of non-confidence and non-trust in Mr. Finkel?

MR. WAGNER: Objection, your Honor, leading. In fact, your Honor, he is putting words in his mouth.

MR. APOTHEKER: I withdraw the question, your Honor.

Q How did you feel about Mr. Finkel after that occurrence?

A I certainly didn't want him working for me either in the District Attorney's [595] office or in the Public Defender's office.

Q Did there come a time--

THE COURT: Just one second.

When did you learn about this incident between Mr. Finkel and Mr. Gribetz?

THE WITNESS: Probably late, or early fall, October in 1977, your Honor.

THE COURT: How did you learn about it?

THE WITNESS: Mr. Gribetz came to me and told me what the situation was. As a matter of fact, I think he asked me to look into the case to see if there was a problem we were not aware of in the case.

THE COURT: Mr. Apotheker.

Q Did there come a time when you had a conversation with Mr. Barone about this occurrence?

A Yes. Mr. Barone, I believe it was January 6th, called me at my house after we left this particular court and asked me -- I had told him prior to that that one of his men had, in my opinion, betrayed a confidence of his, and I didn't go any further with it -- after the appearance here on January 6th he called me at my home in the evening and asked me if I would tell him, he was interested in who it was and what it was about, and I did. [596]

Q Mr. Branti, did there come a time when you were involved as a District Attorney with Mr. Finkel, who was representing someone form the Public Defender's office?

A Yes, sir.

Q Did you reach, as a result of that

meeting or case, did you reach a conclusion about how Mr. Finkel operated as an Assistant Public Defender?

A Well, at least on that particular occasion I did, yes.

Q When did that occur?

A 1976, sometime during 1976.

Q What was that occurrence?

A I had a case of armed robbery. I believe there were three co-defendants involved. I believe there were three. There may have been two, I can't specifically recall the name of the case. It occurred in the Town of Orangetown.

The defendant that the Public Defender's office was representing by Mr. Finkel was the getaway driver of the car.

We did not have an identification of this particular defendant at the scene of the crime; however, he was apprehended some forty or forty-five minutes later fleeing from the car that had been involved.

In any event, the case had been presented to a grant jury, and an indictment resulted in the three, or two co-defendants, I can't recall whether it was three or two. [597]

We had some conferences on the matter. The case was getting ready to go to trial. I had approached Mr. Finkel and asked if his client would consider testifying against the other two individuals in return for a misdemeanor plea. There was no question I had, in my opinion, a difficult case against his client.

I believe at that point he rejected it and indicated that his client was innocent.

I believe the afternoon we were preparing to pick the jury or preparing to have a suppression hearing, I don't recall which, all three individuals entered pleas of guilty. The other two defendants, I believe, pled to robbery in the third degree, and Mr. Finkel's defendant pled to a misdemeanor, which I had originally offered, and as we left the courtroom I was smoking a cigarette in the hallway, and Mr. Finkel came up to me with a smile on his face and said, "You owe me one, because my man was innocent."

I was shocked, and I told him, "If your man was innocent, you should have gone to

trial, but, in any event, don't let anybody hear you talk like that."

Q Did those occurrences enable you to form an opinion as to whether Mr. Finkel was properly performing his functions as an [598] Assistant Public Defender when you were considering reappointing him.

A Those occurrences to me, sir, meant that, whether I was Public Defender or a private practitioner or District Attorney of Rockland County, Mr. Finkel was not going to work for me.

MR. APOTHEKER: No further questions, your Honor.

CROSS EXAMINATION

BY MR. WAGNER:

Q Mr. Branti, do you recall the name of this case involving armed robbery?

A No, I don't.

Q Can you tell us the name of any of the defendants who were involved?

A No, I can't. It was in a location that used to be Larkin's Bar & Grill in the Town of Orangetown, I believe.

MR. WAGNER: May I have just a minute, since this is the first time I have

heard this information, and I would like to speak to Mr. Finkel?

(Pause)

Q Mr. Branti, you said this case that you had, this armed robbery case you had, occurred in 1976?

A I'm sure it was '76. It may have been late '75.

* [648]

THE COURT: Gentlemen, I understand that that concludes the case from the point of view of both sides, and I would suggest this now as the briefing schedule: that simultaneous briefs will be submitted by plaintiffs and defendant on February 24, and any responsive briefs will be served by both sides on March 3.

It is understood that the temporary restraining order will remain in effect until decision is rendered.

MR. APOTHEKER: your Honor, does that mean served and filed by March 3? Or served on March 3?

THE COURT: It means served and filed on both those dates, on February 24 and on March 3. Anything further, gentlemen?

MR. WAGNER: Thank you, your Honor. Nothing further for the plaintiffs.

MR. APOTHEKER: Thank you, your Honor.

MR. SCHOENBERGER: Thank you, your Honor.

THE COURT: Thank you, gentlemen.

Time noted: 5:03 p.m.

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-1654

PETER BRANTI, As Public Defender
of Rockland County

Petitioner,

vs

AARON FINKEL AND ALAN TABAKMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

(Numbers in Parenthesis refer to pages in Petition unless otherwise noted)

This is an action pursuant to Section 1983 U.S.C. as interpreted by this Court in Elrod vs Burns, 427 U.S. 347, (1976) resulting from Petitioner's refusal to continue Respondents' employment solely because they failed to obtain sponsorship by a member of the majority Party

of the Rockland County Legislature.

The Public Defender of the County of Rockland is appointed by the County Legislature and serves a six-year term. Nominally, at least, appointments to the position of Assistant Public Defender are solely his province. Respondent FINKEL was appointed to that position in 1971 by the then Democratic Public Defender, Arnold Becker, and continued working in that position throughout the six-year term of Frank Barone, Becker's Republican appointed successor. Respondent TABAKMAN was appointed by Barone in 1975. Respondent TABAKMAN was a registered Republican at the time of his appointment; Respondent FINKEL was a registered Republican at the time of his appointment but changed his registration in February of 1977. However, Respondent FINKEL was regarded by the relevent parties to be a Republican during the period herein in issue (28a FN.2).

Having been apprised by the media of the

impending appointment of Petitioner as Public Defender, Respondents, on December 30, 1977, advised the Petitioner of their intent to exercise their Constitutional rights pursuant to this Court's decision in Elrod vs Burns and requested Petitioner, based upon that authority, to continue Respondents in their employment. Despite this request, on January 3, 1978, Petitioner, upon assuming the office of Public Defender, refused to continue Respondents in their former positions as Assistant Public Defenders and, in fact, attempted to replace them with registered Democrats. All of the Assistant Public Defenders appointed by Petitioner were sponsored by the Democratic caucus of the Rockland County Legislature or members thereof; eight of the nine appointees were Democrats.

On January 4, 1978, learning that their legitimate expectation of continued employment, Perry vs Sinderman, 408 U.S. 593 (1972), had

been rejected by Petitioner, Respondents commenced this action by way of Temporary Restraining Order and, thereafter, a plenary trial was held and a permanent injunction granted by the District Court. In the interim, pursuant to the terms of the Temporary Restraining Order, Respondents continued to receive their bi-weekly salary checks from the County of Rockland until the month of May, 1978, although they were not assigned any duties by Petitioner. At that time Petitioner's attorney hit upon the legally questionable device of issuing Respondents' checks pursuant to the Temporary Restraining Order of the District Court, but holding them "in escrow" pending a final determination of this matter on the merits. Thereafter, in October of 1978, Petitioner found that he had exceeded the amount allocated by the County Legislature for his 1978 budget inasmuch as he was paying two additional Assistant Public Defenders and, at that point, reinstated Respondents as Assistant Public Defenders, a position

in which they continue to serve, in exemplary fashion, to this day.

Petitioner appealed the District Court Order to the Second Circuit Court of Appeals, which unanimously affirmed the District Court and inter alia, disposed of the argument presented on Pages 6 and 7 of the Petition herein as follows, "The exempt class is defined in the Civil Service Rules and Regulations (Section 2.1[a]) as follows, 'Positions in the exempt class are those, other than unskilled labor positions, for which competitive examinations or other qualification requirements are not practicable.' It was even asserted at oral argument that an Assistant Public Defender is called a policy-maker by the Civil Service Regulations. Our research has not led to any verification of this assertion; nothing of this sort has been found in the Regulations." (4a).

REASONS FOR DENIAL OF CERTIORARI

It is respectfully submitted that this case does not meet the appropriate test set forth in

Rule 19 of the Rules of this Court for granting of Certiorari.

I. There is no conflict among the Federal Circuits.

Petitioner urges this Court that the Fourth Circuit's decision in Ramey vs Harber, 589 F. 2nd 753 (1978) reversing the District Court's decision in favor of plaintiffs who were not rehired to their positions as Deputy Sheriff, constitutes a conflict between the Fourth and Second Circuits. However, even a cursory reading of the majority decision of the Fourth Circuit clearly indicates that the sole reason for the reversal was the Fourth Circuit's refusal to apply Elrod retroactively as the District Court had done. "Although there is some doubt regarding the application of Elrod in this case, it is unnecessary to decide that question in view of our conclusion on the issue of retroactivity. Therefore, for the purposes of disposing of this litigation, we assume without deciding that Elrod is applicable." (Emphasis supplied). Indeed, Circuit Judge HALL

expressed his dissent solely "because I feared that the majority opinion may be read to imply that Elrod would apply prospectively on facts similar to this case * * *." (Page 761). The refusal of Sheriff Harber to reappoint Deputies who had campaigned against him occurred before this Court's decision in Elrod vs Burns. However, the opposite is true in the case sub-judice. This Court decided Elrod in 1976; Petitioner's attempted abrogation of Respondents' First Amendment rights did not occur until January, 1978 and, in fact, Petitioner was advised by Respondents of their intention to rely on this Court's holding in Elrod should he persist in his efforts to deny them their jobs as Assistant Public Defenders solely because of their lack of majority Party sponsorship.

II. There is no issue of Federal Law involved which should be settled by this Court.

The plurality decision in Elrod, strictly followed by the District and Circuit Judges herein, constitutes a clear Constitutional mand-

ate to all lower Courts. This Court should not be called upon to sit in factual review each time the classification of plaintiff changes from Deputy Sheriff to Janitor or to Assistant Public Defender. Factual findings are the province of the District Court; indeed, Trial Court findings of fact and conclusions of law must be affirmed by Appellate Courts absent the definite and firm conviction that a mistake has been committed. United States vs U. S. U. S. Gypsum Company, 333 U.S. 364 (1948).

III. There is no conflict between the Circuit Court decision and applicable decisions of this Court.

As pointed out in II supra, the District Court stated the narrow issue to be decided in quoting from Mr. Justice STEWART'S concurrence in Elrod as follows, "Are plaintiffs non-policy making, non-confidential government employees, who, solely for political reasons, are threatened with removal from jobs they are competent to perform and have been satisfactorily performing?" Thereafter, as an evidentiary finding, District Judge BRODERICK stated, "On the basis

of the evidence presented at the hearing and the applicable law, I find that the answer to this question is Yes * * *." Far from being in conflict with the applicable decisions of this Court, this decision is in complete consonance with the holding in Elrod.

IV. There has been no departure from the accepted and usual course of Judicial proceedings, either by the Circuit or District Court.

For the reasons expressed in II and III supra, it is again apparent that the District Court in deciding and the Circuit Court in affirming Respondents' Constitutionally protected right of free speech have followed the decisions of this Court.

V. The Second Circuit's affirmance herein does not extend the holding in Elrod vs Burns.

Petitioner would urge this Court that attorneys are, in effect, ipso facto either confidential, policy-making, or both. In fact, the argument presented on Page 10 of the Petition would exclude all attorneys from the protective

umbrella of Elrod. We reiterate that this is not the law, nor the intent of this Court. In Newcomb vs Brennan, 558 F. 2nd 825 Cert. Denied 434 U.S. 968 (1977), the Circuit Court for the Seventh Circuit distinguished between policy-making functions of plaintiff Deputy City Attorney and the non-policy-making functions of of the Civil Service Assistant City Attorneys who were supervised by plaintiff Newcomb. The Court there, in assessing the applicable standard under Elrod, took into account the fact that plaintiff Newcomb was personally appointed by the City Attorney to supervise Assistant City Attorneys; that he was in line to succeed the Mayor of the city, and that he exercised a supervisory capacity over other attorneys under him. Nowhere did the Court even intimate that the mere fact that he was an attorney automatically placed him in a policy-making or confidential position.

VI. Issues of Policy-making and confidentiality must be decided on a case-by-case basis.

Respondents agree with the citation from the Harvard Law Review contained in the Petition as well as the citation of Judge CAMPBELL's concurrence in Illinois State Employees Union Council 34 vs Lewis, 473 F. 2nd 561 (7th Cir. 1972) Cert. Denied 410 U.S. 928 (1973), that the applicability of Elrod must be determined on a case-by-case basis. The concurrence of Judge CAMPBELL that any employee engaged directly or indirectly in the formulation or implementation of the policies of the particular governmental office or agency falls without the Elrod protection supplies the appropriate parameter. The District Court in the case at bar specifically found that plaintiffs are non-policy-making, do not act as advisors or formulaters of plans for the implementation of broad goals of the office (21a) and further, that Respondents were not confidential employees within the relevent sense (22a-23a).

The Circuit Court unanimously affirmed, having "no doubt that Judge BRODERICK was correct in concluding that an Assistant Public Defender was neither a policy-maker nor a confidential employee." (4a). Petitioner, seeking to overturn a factual finding of a trial Court, dependent upon testimony involving candor and credibility, has a great burden to overcome. United States vs United States Gypsum Company, supra. We respectfully submit that Petitioner falls woefully short of meeting that burden.

VII. The requirement of political sponsorship for government employment violates Respondents' Constitutional rights.

Petitioner argues that the necessity for obtaining sponsorship for governmental employment does not deprive anyone of his Constitutional rights (13). However, one of the findings of the Court in Elrod was that Respondents were discharged from their employment because

they "did not support and were not members of Democratic Party and had failed to obtain the sponsorship of one of its leaders." (Emphasis supplied). Indeed, on Page 355 the Court, setting out the costs of the practice of patronage includes "sponsorship" with the other evils proscribed.

The argument that Respondents do not come into Court with clean hands, having been appointed through the political system which they allegedly attack, is not only false but irrelevent. Obviously, any political appointee bringing an action of this type would have been appointed by the very system which was found to be Constitutionally impermissible in Elrod. Indeed, if this was the standard to be applied, this Court would not have rendered its decision in Elrod.

However, there is a further distinction. Testimony taken before the District Court indicates that, since the position of Public

Defender was created in the County of Rockland it has been held, successively, by a Democrat, a Republican and now by Petitioner, a Democrat. The testimony clearly indicates that the predecessors of Petitioner both administered the office without regard to the political affiliation of Assistant Public Defenders; indeed, Respondent FINKEL, then a Republican, was appointed by Democratic Public Defender Arnold Becker. Only Petitioner has attempted this brazen and callous political manipulation of the fiduciary position of defender of the indigent. Only Petitioner has failed to appoint even one member of the opposing major political Party in Rockland County. Who comes into Court with unclean hands?

VIII. Petitioner's "same decision anyway" defense was a post hoc fabrication without substance.

On January 6, 1978, testifying in opposition to Respondent's application for a Temporary Restraining Order, Petitioner characterized

Respondent FINKEL as "A competent attorney * * *. I like Mr. FINKEL, Mr. FINKEL, in my opinion is a wonderful person * * *." Respondent TABAKMAN was also characterized as a competent attorney. A month later, on February 14th, Petitioner, for the first time, contended that factors other than the political process played a part in his determination not to retain Respondents. This obvious reversal of position was characterized by the District Judge as "A post hoc rationalization that defendant devised late in the hearing process in an effort to thwart what was apparently perceived to be plaintiffs' promising development of the case." (25a). Petitioner was further gently chastised by the District Court in Footnote 11 (32a), "At the second set of hearings BRANTI, apparently believing that the case was not going well, changed his testimony. I do not credit his later testimony, which was apparently structured to meet the perceived

needs of the litigation as it developed."

Findings of a trial Court, when dependent upon oral testimony where the candor and credibility of the witnesses can best be judged, have great weight with Appellate Courts. United States vs United States Gypsum, supra. Petitioner has had full opportunity, unlike Givhan vs Western Line Consolidated School District, - U.S. - 58 LEd 2nd 619 (1979) to raise the "same result anyway" defense set forth by this Court in Mount Healthy City Board of Education vs Doyle, 429 U.S. 274 (1977). This testimony as to "other reasons" for failure to continue Respondents in employment was rejected in toto by the Trial Judge who found defendants' failure to be reappointed due solely to their political beliefs. (25a).

CONCLUSION

Petitioner essentially seeks leave to reargue factual issues decided against him by both the District and Circuit Courts below. It is

certainly not the proper function of the highest Court of the United States to grant Certiorari to every disappointed litigant who claims that his case is factually different from the legal principles enunciated by this Court. To do so would result not only in chaos in the administration of justice at the apex of the Federal Court System, but would, effectively, deprive this Court of the time required for formulating the broad principles of law required for the guidance of lower Courts. This application for Writ of Certiorari should be denied.

Respectfully submitted,

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In The

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OCTOBER TERM, 1979

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Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979
NO. 78-1654

PETER BRANTI, As Public Defender
of Rockland County

Petitioner

vs

AARON FINKEL and ALAN TABAKMAN,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The memorandum and judgment of the Second Circuit Court of Appeals dated February 20, 1979, which judgment is sought to be reversed, is not officially reported and is printed in the Appendix to the Petition for Certiorari at pages 1A - 4A. The opinion of the United States District Court for the Southern District of New York also reprinted in the Appendix to the Petition for Certiorari at pages 5A - 32A is reported in 457 F. Supp. 1284.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). The Judgment of the Court of Appeals was entered on March 19, 1979. The Petition for Certiorari was filed on April 30, 1979 and was granted by this Court on June 25, 1979.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. 1983, which are set forth in the Appendix to the Petition for Certiorari at page 33a.

QUESTIONS PRESENTED

1. Whether the Circuit and District Courts' holdings have extended and/or misinterpreted *Elrod v. Burns* by equating mere sponsorship with political coercion and by including attorneys employed part-time as Assistant Public Defenders within a class of non-policymaking, non-confidential employees, such as clerks, sheriff's deputies and janitors. The affirmance of the Trial Court's judgment virtually eliminates political appointments in Federal, State and Local Governments.

2. Whether the District Court's holding was clearly erroneous in that Petitioner did present a legitimate, same decision anyway defense and Respondents did not meet their burden under *Mount Healthy City Board of Education v. Doyle*.

3. Whether the ruling in *Ramey v. Harber* by the 4th Circuit Court of Appeals as to the applicability of *Elrod v. Burns* is correct and should be followed in the case at bar.

STATEMENT OF THE CASE

On January 4, 1978, Respondents (hereafter referred to as Messrs. Finkel and Tabakman) brought suit in the District Court for the Southern District of New York against Peter Branti, as Public Defender of the County of Rockland, New York and members of the County Legislature alleging that they were threatened with the termination of their positions as Assistant Public Defenders solely because of their affiliation with the Republican Party. (The case against all defendants except Mr. Branti was dismissed prior to the plenary trial.) The Respondents claimed that they were neither policymaking nor confidential employees and that they were satisfactorily performing their duties. They sought injunctive relief upon the claim that the threatened action violated their First and Fourteenth Amendment rights to freedom of political association and belief.

The Respondents, Aaron Finkel and Alan Tabakman, as Assistant Public Defenders, were appointed in 1971 and 1975, respectively. Assistant Public Defenders hold part-time positions in Rockland County, permitting their private practice of law. Respondents were in the exempt class of Civil Service serving at the pleasure of the Public Defender. The former Public Defender, Frank Barone, had a term of office which ended December 31, 1977, and his termination ended the employment of all his assistants. In the past, the terms of all Assistant Public Defenders ended with the term of the Public Defender. A new Public Defender would then make appointments to fill such positions in accordance with New York Law.

Upon his appointment as Public Defender, Mr. Branti appointed his assistants. All of the assistants appointed by Mr. Branti were registered Democrats, except one individual, who had no party affiliation. Mr. Branti did *not* reappoint two registered *Democrats*.

Respondents and their witnesses described Respondents' job performance as satisfactory with no policymaking or confidential function. Respondents maintainted that their failure to obtain the sponsorship of a member of the Democratic Caucus was the sole reason they were not reappointed. Respondents both admitted that no one conditioned their reappointment on Respondents' willingness to change their party registration, contribute money to the Democratic Party or support the Democratic Party in any way.

Petitioner and his witnesses maintained that although the Democratic Caucus could and did submit recommendations to the Petitioner for his consideration, the Petitioner had the right to refuse those recommendations and ultimately, his choice was final. No one conditioned Petitioner's appointment as Public Defender upon an agreement to hire or fire anyone. Petitioner described Respondents as "competent attorneys" but based upon Petitioner's experience as a former Assistant District Attorney, Respondents were not *competent Assistant Public Defenders* for a variety of reasons described in depth in the record. Petitioner felt that since his assistants are an extension of the Public Defender in each of the courts they appear in, they must, of necessity, enjoy a confidential relationship with him.

James Anderson, the County Personnel Officer, testified that Assistant Public Defenders are in the "exempt" class meaning that these persons carry out "major functions of the principal as though the principal were present" or that they served in a confidential capacity. Of the approximately 2000 County government employees, *less than* 50 served in the "exempt" class which included all of the Assistant Public Defenders, Assistant District Attorneys and some of the Assistant County Attorneys. These were considered "Confidential" positions.

After a non-jury trial, District Court Judge Vincent L. Broderick on September 29, 1978, issued his decision permanently enjoining the Petitioner, Branti, from terminating the employment of Messrs. Finkel and Tabakman as Assistant Public Defenders on the sole ground of their political beliefs.

On October 10, 1978, Judge Broderick signed final judgment in this case. On February 20, 1979, the Circuit Court of Appeals unanimously affirmed Judge Broderick's decision.

SUMMARY OF ARGUMENT

1. The prime issue in this case is whether mere sponsorship unaccompanied by other coercive acts as outlined in *Elrod v.Burns* offends the Constitution of the United States. Respondents argue that they were required to obtain the sponsorship of a Democratic Legislator in order to be retained as employees of the Public Defender. Petitioner argues that the Constitution is not breached by Democratic sponsored attorneys replacing Republicans as long as the Republicans were not coerced into providing support in some acceptable manner for the favored party. There is no allegation by the Respondents in this case that they were ever coerced or required to exchange anything in return for their jobs. Petitioner argues that mere sponsorship is not in and of itself unconstitutional and requires no compelling state interest in order to make it permissible. However, Petitioner argues that there may very well be a compelling state interest in a) providing attorneys with an entry into the political system; b) giving these attorneys relevant governmental training and experience; and c) providing political parties with a method or recruitment and training future elective office holders. The affirmance of the lower Courts' rulings will provide an entry barrier to these attorneys, stifle affirmative action in governmental employment and lead to the end of all constitutionally permissible patronage practices.

2. Attorneys, generally, and Respondents, Assistant Public Defenders are confidential, policymaking employees. Attorneys fall into a special class and usually have wide discretion in their duties. Attorneys should not be placed in the same class of employees who have little or no discretion such as janitors, deputy sheriffs, and clerks. The duties of a Public Defender and his Assistants are one and the same.

3. Petitioner argues that the lower Courts' decisions are clearly erroneous in that *Mount Healthy City Board of Education v. Doyle* mandates that the Respondents must meet their burden of showing that their constitutionally protected conduct played a substantial role in their non-reappointment. We believe the Respondents did not meet this burden at trial. However, the Petitioner did meet his burden in showing that he would not, under any circumstances, have reappointed these Respondents ("same decision anyway"). Petitioner also argues that the District Courts' rejection of the testimony of the Personnel Officer of Rockland County that the positions of Assistant Public Defender are confidential in nature, was also clearly erroneous and that the rejection of Petitioner Branti's testimony was arbitrary and without foundation.

4. Petitioner further argues that the recent decision of the 4th Circuit in *Ramey v. Harber* and its analysis of the plurality opinion in *Elrod v. Burns* is a correct one and has similar application to the case at bar.

POINT I
THE DECISION BELOW, BY EQUATING MERE SPONSORSHIP WITH POLITICAL COERCION EXTENDS THIS COURT'S DECISION IN ELROD v. BURNS, AND IN EFFECT ELIMINATES VIRTUALLY ALL FORMS OF CONSTITUTIONALLY PERMISSIBLE POLITICAL PATRONAGE

Petitioner has maintained throughout this case that what happened in Rockland County in the Fall-Winter of 1977-1978 is entirely distinguishable from the facts in *Elrod v. Burns*,[1] and calls for a different conclusion.

In *Elrod v. Burns*, supra, approximately fifty percent of the entire Sheriff's Department of Cook County was placed in a non-civil service category.[2] There was a history of a newly elected party discharging the political opposition from their jobs.[3] There was a factual finding that the Sheriff's employees in *Elrod* were threatened with discharge because of their failure to either pledge their allegiance to the Democratic Party, contribute money to the Democratic Party, work for the election of other candidates of the Democratic Party, or obtain the sponsorship of a member of the Party, *usually* at the price of one of the first three alternatives.[4]

Comparing those facts with the facts in this case we find an entirely different set of circumstances. In Rockland County's Public Defender's Office, the Assistant Public Defenders serve at the pleasure of the Public Defender and their offices become vacant when a new Public Defender is appointed (A. 138). Thus the

1 427 U.S. 347
2 Id. at p. 377
3 Id. at p. 351
4 Id. at p. 355

Respondents were not discharged, but simply not rehired by a new Public Defender.[5]

In Rockland County only 50 of the 2,000 Rockland County employees are in the exempt class. Out of these 50 employees, attorneys total 34 (A. 135-137). The balance of all other County employees are within the civil service merit system. Thus the merit system is the principal criteria for public employment in Rockland County Government.

Historically Rockland County has not followed wholly partisan considerations in staffing either the Public Defender's Office or the County generally. For example, when Arnold Becker, a Democrat, was Public Defender, he hired Republicans such as Respondent Finkel (A. 47). When Frank Barone, a Republican, was the Public Defender he hired Democrats (A. 47). The new Public Defender, Petitioner, Branti, chose not to retain Republicans *and Democrats* (A. 162).

The Democratic Majority in the Rockland County Legislature since 1974 has appointed various Republicans and persons with no political registration to various policymaking and exempt positions; (A. 296-304). Therefore, Rockland County does not practice nefarious party politics.

Respondents allege that they were not continued in office because of their failure to obtain a sponsor. Although Petitioner does not admit that there was a requirement of sponsorship in order to be appointed or reappointed to the Public Defender's Office, however, to squarely present the issue Petitioner will for the

5 They had no reasonable expectation of being retained as was the case in *Perry v. Sindermann, 408 U.S. 593.*

purposes of this appeal assume but not concede the factual findings of the District Judge that one needed sponsorship in order to be appointed to the Public Defender's Office.

Dealing with the issue of sponsorship, a significant difference with *Elrod v. Burns*, supra, appears. Sponsorship in *Elrod* was tied to and coupled with political coercion and did not involve a political party or individual making recommendations of prospective employees to the department head. The testimony in this case demonstrates that the Respondents were never coerced to do anything in exchange for their retention. Therefore, we are dealing herein, only with sponsorship without any coercion. When the political leaders decided to appoint Mr. Branti as the Public Defender, they did so with the clear understanding that Mr. Branti could and would have the *final* say as to who he would employ as his Assistants (A. 148). Mr. Branti knew that he was appointed by the political majority of the Rockland County Legislature. The Rockland County Legislature has the power of the purse over the Public Defender's Office.[6] While *Gideon v. Wainwright*[7] and the New York State statutes that followed mandated that localities must provide for the criminal defense of the poor, they do not dictate how many individuals are to be employed in the Defender's Office and how high the appropriation for such Office is required in any particular year. The political majority of the legislative body determines whether a Public Defender's Office will have one assistant, three assistants or twenty assistants. The political majority determines whether these assistants will be able to attend schools and conferences to better assist them in the criminal

6 This is no different than the various Congressional, Senatorial and State Legislature Appropriation Committees.

7 372 U.S. 589.

defense of the poor. Branti knew that continued support of the political majority was essential to maintain the integrity and the proper functioning of his office. Thus, he chose to consider the majority's recommendations and to appoint them *unless* they were not qualified.

Rockland County is geographically one of the smallest counties in New York State and Mr. Branti knew professionally almost every attorney specializing in criminal law in Rockland County (A. 148). In addition, he experienced social contacts at political gatherings with most of the Democratic attorneys of the County. Thus, Mr. Branti was well acquainted with the attorneys recommended to him; they were not strangers but rather friends. The attorneys recommended by the political majority were highly qualified for the positions of Assistant Public Defender. Some of them, the testimony shows, were attorneys whom Mr. Branti intended to appoint regardless of any recommendation (A. 148-149). They were respected colleagues and/or personal friends of Mr. Branti, and persons Mr. Branti trusted, respected, and wanted in his office. Fortunately, they were recommended to him by the political majority as well.[8] Is this any different than an executive in a large private corporation taking some of his former staff and/or hiring new staff when he moves to a new executive position.?

Judge Broderick found that the Petitioner had, at most, a veto power over the individuals recommended to him.[9] Obviously that veto power was a significant limitation on the Political Party's will in that if Mr. Branti did not believe that an individual recommended to him

8 See testimony (at A. 307-308) of Legislative Chairman Colman as to why one was recommended if Petitioner would appoint anyway.

9 457 F. Supp. 1284, 1287-1288

was qualified, Mr. Branti could veto that individual and request additional recommendations. Mr. Branti could have continued to veto the persons recommended to him until he obtained a name that was suitable to him. The actual fact in this case was that the names submitted to Mr. Branti were qualified attorneys and in his judgement there was no need for the exercise of his veto power. However, the power to veto was his and that veto power is a distinct difference from the facts in *Elrod*.

Does mere sponsorship so violate the Constitution as to require a compelling state interest in order to be permissible?

A sponsor is defined 10 as someone who accepts responsibility for someone else or who assumes or to whom is delegated responsibility for some other person or thing. Sponsorship and a democratic political system are inseparable. In seeking elective public office or appointive public office, one must seek the help or sponsorship of other individuals or groups of individuals. The Court may take Judicial Notice of that fact of political life. For example, sponsorship is the method by which Federal Judges are appointed. A prospective Federal Judge is sponsored by a United States Senator in order to be appointed by the President of the United States. Occasionally, as in the present case of Archibald Cox, sponsorship by a certain Senator may be the reason the President fails to appoint that individual, thus a political consideration. Judge Jon Newman was recently appointed to the Second Circuit through the sponsorship of Senator Abraham Ribicoff of Connecticut. Judge Newman, although highly qualified, was characterized as Senator Ribicoff's protege'. Does this type of

10 Websters New International Dictionary, Second Edition.

sponsorship offend the Constitution? [11] Is a compelling state interest required to justify this type of sponsorship? Petitioner argues that sponsorship absent coercion, does not need the excuse of a compelling state interest in order to be constitutional; in short, there is nothing wrong with sponsorship. Sponsorship and politics exist in practically every selection process.

Can this Court effectively eliminate politics and sponsorship from any selection process? [12] Whenever one requires the support of a group of individuals, there is a political consideration. This Court should not totally eliminate that kind of consideration in appointment to governmental jobs of a professional nature. Mere sponsorship, whether it be for the position of Federal Judge or Assistant Public Defender does not offend the Constitution and does not require a compelling state interest in order to be permissable.

For almost every position in appointive public office there are a number of highly qualified applicants, some of whom will be selected and others who will not be selected. It is not constitutionally repugnant to be appointed through the efforts of a political party as long as no coercion attaches to that sponsorship which

11 See *Newsweek*, February 12, 1979, "*Judges: on the merits?*" in which former Attorney General Bell describing his appointment to the Federal Bench in 1961 was quoted "I wasn't merit selected. I knew two Senators and one President, so I was appointed."
See also, the recent study of *American Judicature Society* quoted in *New York Law Journal* August 14, 1979 which study maintains that political considerations still are a major factor in appointments to the Federal Bench.

12 See *Newsweek*, October 30, 1978, "*Pope From Poland*" which leads one to the conclusion that there is politics and sponsorship in religion, private industry and social clubs as well as government.

detrimentally affects the political beliefs of employees who are not reappointed to the office. In other words, the Constitution permits Democratic employees sponsored by their Party to replace Republican incumbents whose terms have expired as long as the Republicans were not coerced into changing their political beliefs in order to be retained.

Although Petitioner never sought to justify the non-retention of Respondents on the basis of compelling state interest, it is arguable that there is a compelling state interest in using appointive legal positions to recruit and train future candidates for elective public office.

The political system in Rockland County whereby people are recommended to a department head for his review and appointment is either a justifiable intrusion or no intrusion at all on the constitutional rights of the Respondents.

Elected officals have the right and the responsibility to influence the selection of employees for positions of public trust. The performance of those employees will reflect either well or badly on the elected officals. There is an incentive to recommend the best available, qualified individuals so that the government will operate efficiently and the elected officals can be re-elected to public office.

Obtaining sponsorship or recommendations from elected officals provides those attorneys who work for party organizations the opportunity for governmental service and possibly, thereafter, their own candidacy for elective office. This stregthens party structure at no one's expense. Judge Broderick, in Footnote 13 of his Opinion, [13] seemed disturbed that

13 457 F. Supp at page 1293.

the Assistant Public Defender's political persuasion influenced whether he or she should be appointed to that position. Petitioner agrees that one's political affiliation does not make one an effective or non-effective Public Defender. (Certainly a person's views on the poor and underprivileged is a legitimate area of concern.) However, appointment to the position of Assistant Public Defender does furnish one with an entry into public service and therefore gives relevant governmental experience. It also can serve as a transitional phase from private practice into governmental service.

A major function of party organizations is the recruitment and training of future candidates for elective office and one way of accomplishing this objective is to recruit lawyers. If the political parties do not have the right to influence the selection of lawyers for appointive office, an *entry barrier* to public office is established and therefore, elective office will be only available to the very rich and powerful who can create their own opportunity for experience and training and finance their own campaigns.[14]

Party organizations accomplish the recruitment and training and provide relevant experience to future elective office seekers by recruiting people, including lawyers, to run for local elective office and particularly by recruiting lawyers to fill appointive positions, such as Assistant District Attorney, Assistant County Attorney and Assistant Public Defender. [15] Dan Nimmo and Thomas D. Ungs, in their treatise, *American Political Patterns: Conflict and Consensus, state:*

14 Schlesinger, Joseph A., *Ambition and Politics: Political Careers in the United States*, Rand McNally & Company (1966), p. 179.

15 Id., pp. 78-79, 87, 179-181.

> "The perfomance of American politicians depends upon more than their popular esteem and social backgrounds; it depends also on the ways in which they are selected for leadership from various segments of the community, introduced to political office, and trained in the appropriate governing skills. We call this process *political recruitment*. 16

And in his treatise *The Lawmakers: Recruitment and Adaption To Legislative Life*, James David Barber quotes V. O. Key, one of the foremost political scientists of the postwar era:

> "Perhaps the most important function that party leadership needs to perform is the development, grooming and promotion of candidates for statewide office. Although striking exceptions may be cited, it is in its inadequacy in this role that the most grave shortcoming of party leadership is to be found. To assert that party leadership of many states develops candidates is more an attribution of a duty stated in the textbooks than a description of real activity." 17

Professor Barber goes on to say,

> "Political leadership selection, then, should be viewed not only as the elimination of certain individuals but also as a process by which candidates are attracted to, recruited for, adapted to, and retained in public service." 18

16 Nimmo, Dan and Thomas D. Ungs, *American Political Patterns: Conflict and Consensus*, Little, Brown and Company (1969), p. 221.

17 Barber, James David, *The Lawmakers:Recruitment and Adaption to Legislative Life*, Yale University Press (1965), pp. 4-5.

18 Id., p. 5.

As previously stated, appointment to the positions of Assistant District Attorney, Assistant County Attorney and Assistant Public Defender, provides attorneys with entry into the politcal system, gives relevant governmental training and provides a recruitment process by the political parties for future elective office. The Court can take Judicial Notice that many attorneys prior to holding elective and/or judicial public office first held appointive public office. In the words of Woodrow Wilson, "The profession I chose was politics; the profession I entered was law. I entered one because I thought it would lead to the other." [19] Earl Warren, former Chief Justice of the United States Supreme Court, started his career as an Assistant District Attorney, probably with the sponsorship of a political party.

Petitioner argues that affirmance of the Lower Courts' ruling would establish an *entry-barrier* to attorneys entering governmental service and future political office, and this constitutes a compelling state interest and may be viewed as a justifiable intrusion or no intrusion at all on the Constitution. We don't believe this Court should create a barrier to entering governmental service and future elective office while at the same time providing part-time government attorneys who have full-time law practices and whose terms of office have expired with lifetime governmental jobs.

Petitioner argues that the decisions below may effectively eliminate a major part of affirmative action in the public sector. Minorities and women are graduating from our law schools in increasing numbers. These new attorneys, especially in the inner-cities, have access to the various political leaders in their communities to seek their assistance in obtaining exempt

19 Schlesinger, Id., p. 17.

governmental employment. If the decisions below are affirmed, that vehicle for the entry into governmental service for these individuals might be effectively blocked.

Petititioner also argues that the Respondents by their own acts have waived any right they may have had to object to their replacement. Not only did the Respondents first obtain their positions through the same political process that they now find inimical to their constitutional rights, but they also sought to retain their jobs through that same political process. [20] Both Respondents believed that in order to be reappointed they required the sponsorship of a Democratic Legislator. However, they were never asked by anyone to do anything in order to keep their jobs. No political leader or officeholder ever told Respondents that they would have to join the Democratic Party, contribute money to the Democratic Party or swear allegiance to the Democratic Party in order to be retained in their positions (A. 90-91, A. 112). The Respondents were *simply ignored*. They were not asked to provide support for the favored party in return for their re-employment. Where was the purposeful and intentional discrimination against these Respondents? Would the Respondents have complained if they had been retained in office others replaced? Do they complain that hundreds of other lawyers in Rockland County weren't considered and appointed to the positions they held? Were such other attorneys in Rockland County, who were ignored by the political process, victims of Constitutional deprivation? [21] We think not. If the gentle and moderate

20 *Nunnery v. Barber*, 503 F. 2d 1349 (Ca 4 1974); *American Federation of State Employees v. Shapp*, 443 Pa. 527, 280 A. 2d 375 (1971).

21 See 78 *Columbia Law Review* 468.

political patronage system followed in Rockland County violated the Constitutional rights of the Respondents, Petitioner argues that all forms of constitutionally permissable political patronage have been effectively eliminated.

POINT II
ATTORNEYS GENERALLY AND ASSISTANT PUBLIC DEFENDERS IN PARTICULAR BY THE NATURE OF THEIR DUTIES ARE POLICYMAKING AND CONFIDENTIAL EMPLOYEES

This Court on a number of occasions has described attorneys as being a special class of individuals. In *Bates v. The State Bar of Arizona*, it was stated,

> "We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. The present members of this Court, licensed attorneys all, could not feel otherwise . . ."[22]

> "Physicians and lawyers for example do not dispense standardized products. They render professional services of almost infinite variety and nature . . ."[23]

> "In most situations it is impossible both for the client and the lawyer to identify with reasonable accuracy in advance the nature and scope of problems that may be encountered even when handling a matter that at the outset seems routine."[24]

> "Lawyers are not hermits and society would suffer if they were. Members of the legal profession customarily are leaders in the civic, charitable, cultural and political life of most communities. Indeed the professional

22 433 U.S. at 368.
23 433 U.S. at 365, Footnote 17.
24 433 U.S. at 392.

> responsibility of lawyers is thought to include the duty of civic and public participation. As a profession lawyers do differ from other callings. This is not a fancied conceit, but a cherished tradition, the preservation of which is essential to the lawyers reverence for his calling . . ."[25]

We argue that attorneys generally and Assistant Public Defenders specifically should not, under the doctrine in *Elrod v. Burns*, be placed in the same class as deputy sheriffs and janitors.

Even the holding of *Elrod v. Burns*, supra, permits a municipal employee, without civil service protection to be discharged by a new political administration solely for political reasons when the employee is either a policymaker or a confidential assistant.[26]

As was stated in a recent Harvard Law Review article:

> "No clear line can be drawn between policy-making and non-policymaking positions. Elevator operators and janitors clearly fall within the Court's proscription of patronage firings, and department heads clearly do not; the applicability of the Elrod decision to the broad range of jobs in between these extremes remains to be resolved on a case by case basis."[27]

Judge Broderick discusses the policymaking and confidential employee exemptions in his opinion [28] and concludes that Messrs. Finkel and Tabakman were in neither category. He believed these gentlemen did not have "broad-scoped duties" as did the discharged

25 433 U.S. at 401, Footnote 11.
26 427 U.S. at 367, 375.
27 90*Harvard Law Review*, 56, 194.
28 457 F. Supp. 1290-1292.

City Attorney who was held to be a policymaker in *Newcomb v. Brennan*.[29]

Petitioner contends that all public employment in the political subdivisions of the State of New York must be governed by the provisions of the State Constitution, Civil Service Law and the rules and regulations promulgated thereunder. (*Bishop v. Wood, 426 U.S. 341, 344; Board of Regents v. Roth*, 408 U.S. 564, 577; *Codd v. Velger*, 429 U.S. 624). James Anderson, the Rockland County Personnel Officer, testified as to the rationale for placing employees such as Assistant Public Defenders in the exempt class:

> ". . .Positions are placed in the exempt class because . . .of a policy determination, carrying out some of the major functions of the principal as though the principal were present, or a confidential relationship. All three or any one of those factors may be present in the determination of a position being placed in the exempt class." (A. 135)

Employees are classified by the Personnel Officer pursuant to Section 20 of the Civil Service Law subject to State Civil Service confirmation. The process that placed the Respondents into a class described by the County's Personnel Officer as confidential and "carrying out some of the major functions of the principal as though the principal were present" should have been enough evidence for the Trial Court to determine that Respondents were policymaking, confidential employees.

In a case decided in Suffolk County, New York, the Court rendered an opinion in a proceeding brought by a discharged Assistant District Attorney seeking

29 558 F. 2d 835 (7th Cir., 1977) cert. den. 434 U.S. 968.

reinstatement to his former position. [30] All of the Suffolk County Assistant District Attorneys were classified as exempt appointees as are the Assistant Public Defenders in the case at bar. In order to bring himself within the protection of the Civil Service Law, the discharged petitioner argued that "not only was he not a deputy, but also, by virtue of his assignment to the screening bureau at the time of his removal he was a subordinate or clerical employee . . . protected by Section 75 (subd. 1, par [b]) of the Civil Service Law" which would require charges and hearing prior to his dismissal. In discussing the issue as to whether the Petitioner was in fact a deputy of the District Attorney, the court said: (id.)

> "An appointee's status as a deputy is determined not by what the appointee in fact does but by what he is directed or authorized to do by the statute, i.e., whether there is a statute authorizing the principal officer to delegate his duties to the subordinate, (*Behringer v. Parisi*, 5 N.Y. 2d 147) . . ."[31]

The Court concluded that the discharged employee did not have a meritorious case and dismissed the petition. The mere fact that his assignment led him to characterize his position as that of a petty subordinate did not, ipso facto, make him one. The operation of the administrative function of the office could not convert the lawyers role as Assistant District Attorney into that of a subordinate office clerk.[32]

The duties of Assistant Public Defenders are markedly similar to those of Assistant District Attorneys

30 *Matter of Clarke v. O'Brien*, 91 Misc., 2d 190, 397 N.Y.S. 2d 509, Aff'd. 56 A.D. 2d 869, 392 N.Y.S. 2d 383 on the opinion below.

31 91 Misc. 2d at 192.

32 91 Misc. 2d at 193.

since they are counterparts (*Matter of Paroli v. Bolton*, 57 Misc. 2d 952, 955, rev on other grounds, 44 A.D. 2d 557, Aff'd. 35 N.Y., 2d 772). The assistant may be *administratively* assigned a subordinate role (as was the case in *Clarke*, supra) but he remains the delegate of the Public Defender since he performs the same duties charged by law to the Public Defender. Section 716 of the County Law authorizes the creation of the Office of the Public Defender by the local Board of Supervisors or Legislature and Section 717 of such law sets forth the duties of the Public Defender as follows:

> "Section 717. Public defender; duties 1. The public defender shall represent, without charge, at the request of the defendant, or by order of the court with the consent of the defendant, each indigent defendant who is charged with a crime as defined in section seven hundred twenty-two-a of the county law in the county or counties in which such public defender serves. When representing an indigent defendant, the public defender shall counsel and represent him at every stage of the proceedings following arrest, shall initiate such proceedings as in his judgment are necessary to protect the rights of the accused; and may, in his discretion, prosecute any appeal, if in his judgment the facts and circustances warrant such appeal."

The office of Public Defender, as a public office, operates upon two distinct and separate levels. One is administrative and the other, substantive. Judge Broderick held, in his Opinion, that Assistant Public Defenders have very limited, if any, responsibilities respecting the overall operation of that office. [33] By

33 457 F. Supp. at 1291.

that, we, assume he means the administrative level, since he recognizes that "with respect to particular cases that they handle, Plaintiffs (Respondents herein) have responsibilites that are not well defined and are of broad scope . . ."[34] The overall operation and function of the Public Defenders office is fixed by statute, directing the office to represent, counsel and defend indigents accused of crime. The statute in fact delegates one of the duties of the sovereign to the Public Defender, i.e. to provide defense services for the poor as it provides prosecutorial services for the State at large.

The Assistant Public Defender assigned to a case carries with him all of the powers and duties assigned by the statute to his principal. The substantive function of the office, the duty to defend, is what is delegated to that assistant. He stands in a court of law or in a jail cell counseling an inmate as the representative of the public which, by its state legislature, has determined that the poor shall have counsel and defense services.

The Trial Court also found that Respondents, as Assistant Public Defenders, did not "formulate plans for the implementation of the broad goals of the office."[35] The broad goal of the Public Defender's office must be that which the statute creating the office and defining its duties commands. Again, that goal is solely to represent and counsel poor persons accused of crime. Each and every Assistant Public Defender must do that at the very least.

The Assistant, as such, stand thus in a markedly different position from that of an ordinary office worker or clerical employee. He must have the entire confidence of his principal since he is charged with

34 Id.
35 Id.

carrying out the very same defense service duties as required of his principal. His conduct, his demeanor and his expertise are all reflections upon his principal. He must discuss the confidences of office clients with his principal as would any attorney employed in a private law office. In short, and excluding some administrative duties of the office, he stands in the same shoes as the Public Defender with reference to the goals and duties of the office.

One may well ask what constitutes policymaking in the Public Defenders office. The Public Defender has no say in determing the character of his clientele or his case load. He may not choose which cases he would prefer to handle. He takes on all who are eligible for his services as commanded by statute and in that respect he differs from the private lawyer who may refuse a retainer for any reason unless ordered by a court. Thus, policymaking cannot include an executive determination as to the case areas and clients the defender will undertake to represent.

In *Newcomb v. Brennan*, supra, and *Ramey v. Harber*[36] no mandates appear for reaching the conclusion that Messrs. Finkel and Tabakman were not policymakers. Since the broadest goals of the office are statutorily defined there is no reason for discussion of petty administrative niceties such as who shall be allowed vacation and when, which clerical worker may have the day off, and the like. Administrative policy of this kind may be made by the department head or delegated to his appointees. That surely cannot be what the *Elrod* plurality meant by "policymaking."

Each Assistant Public Defender is a policymaker in the substantive sense of his duties. A recent article in

36 589 F. 2d 753 (4th Cir. 1978, cert. den.).

the *Journal of the American Judicature Society* supports that assertion.[37]

The second exception carved out by the *Elrod* concurrence involves the consideration of confidentiality. Judge Broderick found that Messrs. Finkel and Tabakman were not confidential employees "in the required sense." [38]

He believed that one must be an advisor to the policymaker or stand in some related confidential status, as the two concepts are complementary.

For the purpose of argument, let us assume that Assistant Public Defenders are *not* policymakers and that only the department head or his chief assistant occupy policymaking posts and on this hypothetical consider the situation in Rockland County. The Public Defender must staff his office to man twenty-three Village and Town Justice or police courts and three County Courts (A. 57). He obviously cannot be in all of the functioning courts at the same time and must rely upon his Assistants to cover all of the cases for which he, the Public Defender, is responsible.

In order to keep himself informed of the workings of his office, the Public Defender must rely upon the advice and the information he receives from his Assistants. Since the exercise of defense responsibility involves more than mere ministerial data gathering, confidential information must pass between the assistant and his principal. The assistant may be responsible for several Justice Courts in which he operates. It is the assistant's responsibility and his duty to protect the rights of the Public Defender's clients by

37 62 Judicature 176 (No. 4 October 1978).
38 457 F. Supp. at 1291-1292

formulating workable plans and advising his principal to have them implemented. The cerebral function of analyzing the problem and advising as to solutions in the conduct of defense services resides with the particular assistant. His role is not that of a mere soldier or messenger (A. 94-104). He is the front line and the cutting edge of the Public Defender's statutory duty and he must therefore stand in a very close personal relationship with his principal.

If the principal does not trust his assistant, or lacks confidence in his dedication and ability, a very serious problem arises. Lack of a confidential relationship between assistant and principal will prevent the principal from carrying out his mandated duty. Thus the assistant must have the confidence of the Public Defender to enable the latter to formulate policy. This point is argued solely to demonstrate that a confidential relationship may exist even where the assistant does not have a specific "policymaking" function, but does not constitute a concession that Assistant Public Defenders are not policymakers in the substantive sense.

Petitioner submits that, in a real and practical sense, Assistant Public Defenders act as representatives of their principal; that the duties of the principal are delegated to all of his assistants; that they are policymakers in a statute-related substantive sense fitting within the definition of the term as illustrated by the *Elrod* plurality; that, at the very least, their positions make them confidential employees of necessity regardless of any determination of their policymaking status. Assistant Public Defenders are the alter egos of the Public Defender and must have his trust and confidence in order to properly perform their duties. Surely, Assistant Public Defenders, charged with the duty of the legal representation of the poor, do not fall

into the same category as janitors. Is not policymaking and confidentiality, in the broad sense, an intricate part of any practicing attorney's trade whether he is an Assistant United States Attorney, Assistant State Attorney, Assistant District Attorney, Assistant County Attorney or Assistant Public Defender? In fact, are not attorneys, by reason of their professional duties, in a continuing confidential relationship with both their employers as well as their clients? Petitioner therefore urges reversal upon these grounds as well.

POINT III
THE DISTRICT COURT'S HOLDING WAS CLEARLY ERRONEOUS - PETITIONER DID PRESENT A LEGITIMATE SAME DECISION ANYWAY DEFENSE IN ACCORDANCE WITH THE MOUNT HEALTHY DECISION OF THIS COURT

Petitioner argues that the Respondents failed to meet their burden of proof at trial pursuant to this Court's opinion in *Mount Healthy City Board of Education v. Doyle*.[39] However, Petitioner did meet his burden of going forward with evidence to show the non-political grounds for his decision not to reappoint Respondents. The Second Circuit rejected that argument on the grounds that since Judge Broderick found that the attempted termination was "solely" for political reasons, a finding not clearly erroneous, his decision was wholly consistent with Mounty Healthy (Appendix to Petition, 2a-3a). Petitioner respectfully disagrees with the Second Circuit's interpretation of Mount Healthy and its opinion that the District Court's findings were not clearly erroneous.

Elrod v. Burns, supra, makes it clear that employees must prove that their discharge was based solely upon partisan patronage grounds, that they were satisfactorily performing their jobs and that they were non-policymaking, non-confidential employees. Under the *Mount Healthy* case, the employee would have the initial burden of showing that his constitutionally protected conduct played a substantial role in his employer's decision not to rehire. The burden then would shift to the employer to show by a preponderance

39 429 U.S. 274 (1977).

of the evidence that he would have reached the same decision as to the employee's re-employment even in the absence of the protected conduct.

In the case at bar, the employees (Respondents) did present evidence attempting to show that they required a sponsor in order to be reappointed and that they were satisfactorily performing their jobs and that they were non-policymaking, non-confidential employees. The Petitioner, Branti, then presented evidence on his behalf to show that, even in the absence of political considerations, the Respondents, employees, would not have been re-employed. The District Court Judge, arbitrarily rejected Petitioner's testimony as *post hoc* and *ante litem motem*.[40]

The District Judge held that Mr. Branti decided not to re-appoint Messrs. Finkel and Tabakman solely on the ground of their political associations and beliefs, a clear First and Fourteenth Amendment protected area (*NAACP v. Button*, 371 U.S. 415; *Kusper v. Pontikes, 414 U.S. 51; Keyishian v. Board of Regents, 385 U.S. 589; Perry v. Sindermann*, 408 U.S. 593). That conclusion would be tenable if there were no otherwise valid reasons, substantial or otherwise, in Mr. Branti's mind prior to the time he made his decision not to reappoint them, but that conclusion is erroneous, mindful of the "clearly erroneous" standard applied by the Circuit Courts of Appeal (*Rivera Morales v. Benitez de Rexach*,[41] and *United States v. United States Gypsum* [42]). Mr. Branti testified to several substantial and non-political grounds for deciding not to re-appoint Messrs. Finkel and Tabakman, known to him prior to January, 1978. These reasons involved, a lack of confidence, an ethi-

40 457 F. Supp. at 1292.
41 541 F. 2d 882 (1st Cir.).
42 333 U.S. 364

cal conflict and a perceived disloyalty. They are fully articulated in the record and need not be reiterated here. (A. 366-376).

Moreover, Branti's testimony on the first day of the proceeding is not inconsistent with his statements made on the last day of the trial. On January 6, 1978 (which was the day set for hearing the motion for the preliminary injunction) Mr. Branti said that Messrs. Finkel and Tabakman were both competent attorneys, but that he was not impressed with either of them and would not have appointed them as Assistant Public Defenders in his office (A. 157-163). That position was consistent with testimony he gave on the last trial day (February 10, 1978) concerning Messrs. Tabakman and Finkel (A. 352-355; 366-369).

We submit that Mr. Branti's direct testimony, uncontraverted on cross examination and examination by the Trial Court, indicated that he would not have reappointed the complainants under any circumstances (A. 161-162).

We note what this court said in *Givhan v. Western Line Consolidated School District*,

> "We cannot agree with the Court of Appeals that the record in this case does not admit of the argument that petitioner would have been terminated regardless of her 'demands.' Even absent consideration of petitioner's private encounters with the principal, a decision to terminate based on the reasons detailed at nn1 and 2 ante, would hardly strike us as surprising . . ."[43]

In *Elrod*, the bottom line question was whether the complainants *stated* a federal cause of action. Alleging

43 -- U.S. -- 58 L. Ed. 2d at 626, Footnote 5.

that they were faced with coercive tactics affecting their basic right to free political association and belief, the burden remained with the complainants to demonstrate the truth of their claims at the trial yet to come.. Here, however, we are beyond the pleadings stage. Upon the record made in this case, none of the coercive tactics condemned in *Elrod* have been applied by Mr. Branti, or by anyone else, to either Mr. Finkel or Mr. Tabakman. Thus, the record is barren of the hard proof necessary for Respondents to sustain their initial burden, to prove that their political affiliation was the sole, or substantial, or motivating factor leading to their loss of public employment (A. 89-91; 112).

To fit within the penumbra of *Elrod* proscribed acts respecting the fate of Messrs. Finkel and Tabakman, Mr. Branti, or those political officials associated with him, would have to be shown as having *insisted* upon any or all of the following terms as conditions precedent to retaining them as Assistant Public Defenders:

1. They would have been *directed* to change their party affiliation;

2. They would have been *required* to return a portion of their public salaries to the Democratic Party Purse;

3. They would have been *required* to support the candidates seeking office on the Democratic ballot;

4. They would have been *directed* to do any of the above in exchange for the support of a Democratic County Legislator in their quest for re-appointment as Assistant Public Defenders.

None of these conditions were ever exacted from or required of either Mr. Finkel or Mr. Tabakman, nor does the record contain such evidence (A. 89-91; 112). The *Mount Healthy* standard was therefore not met by the Respondents here.

And nothing in the record suggests that Mr. Branti sought to advantage his party at the expense of Messrs. Finkel and Tabakman's right to freely associate with the Republican Party, to believe in its principles or support its platforms.

On January 6, 1978, Mr. Branti testified that no one in his party told him he would have to discharge Messrs. Finkel or Tabakman as a condition of his own appointment as Public Defender (A. 148, 162-163). He also said that he did not re-appoint Messrs. Leudan and Fitzgerald, who were registered Democrats, and that his decision in all cases was based upon his estimate of the competence and integrity of the candidates for his staff (A. 134, 141).

We think that a fair application of the *Mount Healthy* balancing standard must lead to a result opposite that reached by Judge Broderick. We believe that the defense met the standard announced in that case when the record is considered as a whole. There simply was no conspiratorial design to replace all Republicans with Democrats as Assistant Public Defenders. While Judge Broderick states in his opinion, [44] that Mr. Branti rated the complainants as "competent attorneys" he does not further point out, as appears in the record, that Mr. Branti was *not* referring to them as competent *Assistant Public Defenders* (A. 157-163). Petitioner contends that the Trial Judges' discounting of Mr. Branti's testimony on the last trial day was without foundation and that a review of the entire record demonstrates that Petitioner's testimony was rejected arbitrarily by the District Court. Petitioner also respectfully suggests an examination by this Court of the sealed portion of the record not admitted into evidence by the Trial Judge which relates to the credibility of Respondents'

44 457 F. Supp. at 1292.

witness Frank Barone, in whom the Trial Judge placed great reliance.

The power to make appointments to the position of Assistant Public Defender resides in the Public Defender, (N.Y. County Law, Sec 716 [McKinney]). Older New York decisions teach us what constitutes an appointment under the law.

> "(T)he choice of a person to fill an office constitutes the essence of the appointment; that the selection must be the discretionary act of the officer or board clothed with the power of appointment; that *while he or it may listen to the recommendation or advice of others*, yet the selection must finally be his or its act, which has never been regarded or held to be ministerial (citing cases)" (*People ex rel. Balcom v. Mosher*, 163 N.Y. 32, 40). (emphasis supplied)

By Statute, then Mr. Branti possessed more than a simple veto power.

This Court can and should correct what the Petitioner claim to be error by the Court below in deciding that the law in *Elrod* covers the facts of this case. The *Elrod* holding should be limited to the coercive tactics reported in that case. The decision in *Mount Healthy City Board of Education v. Doyle*, supra, imposes a greater burden upon the respondents than was sustained in the Instant case. In any event, Mr. Branti met his burden of going forward with evidence demonstrating non-partisan and non-political grounds for deciding not to re-appoint Messrs. Finkel and Tabakman. In the absence of specific proof of coercive political tactics brought to bear against either gentleman such as would infringe upon their rights guaranteed by the First and Fourteenth Amendments or those protected by federal statute, the Respondents have failed to meet their initial burden.

POINT IV
THE RULING OF THE 4th CIRCUIT IN RAMEY V. HARBER, WHICH IS AT VARIANCE WITH THE RULINGS IN THIS CASE AS TO THE APPLICABILITY OF ELROD V. BURNS IS CORRECT AND SHOULD BE FOLLOWED IN THE CASE AT BAR

The 4th Circuit in *Ramey v. Harber*, supra, held that they would not apply *Elrod v. Burns*, supra, retroactively. However, in their opinion, the Court stated that Respondent, Harber, made a fairly persuasive argument that *Elrod v. Burns* had no application in their case upon the ground that the facts upon which the Supreme Court based its decision are materially different then those presented in *Ramey*. [45] The 4th Circuit stated that in *Elrod* the deputies who held indefinite terms of appointment were discharged or threatened with discharge solely because they did not support and were not members of the Democratic Party and failed to obtain the sponsorship of one of its leaders. The 4th Circuit found that the facts in the *Ramey* case were dissimilar in the way the Plaintiffs had been appointed, in that the statute appointing the *Ramey* deputy sheriffs contains the only authority for that appointment. [46] Under that statute, the terms of the deputies in Virginia end with the term of their principal. The Court continued that all of the Plaintiffs were familiar with that statute and knew that their appointments terminated with the expiration of Sheriff Flannery's term. [47] They were also aware of the practice which had prevailed for many decades in Lee County and the other small counties under which a change in the political party controlling the sheriff's office is generally followed by a

45 589 F. 2d at 756.
46 Id.
47 Id.

complete change in the deputy positions. [48] The Court stated that Sheriff Harber made no demand on the Plaintiffs that they change their political affiliations as a condition to reappointment. [49]

In the case at bar, the Personnel Officer of Rockland County testified that the terms of the Assistant Public Defenders, ended with the terms of their principal, the Public Defender (A. 138). The Respondents originally obtained their jobs through the same political process and sought to retain their jobs through that process.

In the *Ramey* case the Court noted the intimate relationship that exists between the Sheriff and his Deputies in a small County such as Lee County, Virginia. [50] Petitioner argues that there must be a feeling of confidence and trust between the Public Defender and his Assistants, especially in an Office that has one Public Defender and only nine Assistant Public Defenders.

The *Ramey* Circuit Court held that,

> "the concurrence of Justices Stewart and Blackmun, in the plurality opinion, explicitly limited the Court's holdings to patronage dismissals. As one commentator has observed, the narrow position of the concurrence must be taken as the holding of the court." [51]

In this case, as well as in *Ramey*, there was a non-reappointment at the end of a term. There was no discharge. Circuit Judge Hall in the *Ramey* decision, concurred and stated quite emphatically that *Elrod* had

48 Id.
49 Id.
50 Id at 751.
51 Id.

no application in that case because: 1) the deputies took office pursuant to a statute which fixed their terms; 2) they simply were not rehired after the terms expired; 3) the deputies were not pressured to contribute time or money to the new sheriff's party or to obtain the sponsorship of a member of that party, and; 4) mutual confidence and cooperation must exist in the Lee County Sheriff's Office.[52]

In this case, since the terms of office ended with the Principal, there was no firing but a non-rehiring; there was no pressure brought upon the Respondents to join the Democratic Party, contribute money to the Democratic Party, swear allegiance to the Democratic Party or even find a sponsor; and the Public Defender's Office is the kind of Office that requires mutual trust and confidence between the Public Defender and his Assistants. The facts in this case, as in *Ramey*, are completely dissimilar to *Elrod v. Burns* and call for a reversal.

To equate mere sponsorship with political coercion and to place attorneys in a category with non-policy-making, non-confidential employees will have the effect of eliminating constitutionally permissible forms of patronage and is, in our opinion, an unwarranted drastic extension of the *Elrod* ruling.

52 Id. at 761.

CONCLUSION

For the reasons stated, the judgments below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1654

PETER BRANTI, As Public Defender of Rockland County,
Petitioner

v.

AARON FINKEL and ALAN TABAKMAN,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

(Numbers in parentheses refer to Pages of Appendix)

Rockland County is governed by a Legislature consisting of eighteen members, elected from each of the county's five towns in accordance with that town's proportion of the county population.

The 1977 quadrennial County Legislative elections left the Democratic Party in firm control of that body,

with eleven of the eighteen newly elected members representing that party. The major part of this majority came from the totally Democratic delegations of the Towns of Ramapo and Haverstraw, with, respectively, six and two legislators.

In addition to the routine re-organization of County government, which, of course, occurred on a regular basis after each legislative election, this incoming Democratic majority was faced with an unprecedented additional opportunity which occurred as the result of the concurrent expiration of the term of the Republican-appointed Public Defender, Frank Barone. Thus, the majority party had an additional opportunity, which it was quick to seize, to reward Democratic attorneys who actively supported the successful majority with the political patronage posts of all Assistant Public Defenders and all Assistant County Attorneys, as well as other regular county positions.

The political maneuvering began almost immediately after the electoral results were declared. The Democratic majority, to the exclusion of all other legislators, formed a group known as "The Democratic Caucus" (121) to arbitrate patronage disposition among its members in a prompt, efficient manner.

The Town of Ramapo, dealing from its obvious strength as repository of six of the eleven members of the Democratic caucus, desired the right to select the Chairman and Clerk of the Legislature (312). The Town of Haverstraw, second only to Ramapo as a Democratic stronghold, was allocated the two major appointments of County Attorney and Public Defender, but as the result of that largesse, was not entitled to the appointment of any of the assistants to

these positions. These secondary appointments, numbering fourteen in all and consisting of Assistant Public Defenders and Assistant County Attorneys, were treated as a group and were divided among the Democratic Town delegations (190). These positions were allocated as follows: Town of Ramapo, 6 attorneys; Clarkstown, 4; Orangetown, 1; Stony Point, 1 or 2; Haverstraw, none. The names selected were to be submitted to the appointing authority by the Democratic Chairperson of the County, *Finkel v. Branti,* 457 F. Supp. 1284, 1287 (SDNY 1978).

At the time of these political maneuvers, respondents were serving in the capacity of Assistant Public Defenders. AARON FINKEL had been appointed to that position in 1971 (9) by then Democratic-appointed Public Defender, Arnold Becker (76); ALAN TABAKMAN had been appointed by Mr. Becker's Republican-appointed successor, Frank Barone, in 1975. Both respondents believed their appointment to these positions to be permanent (76, 106) and, in the case of respondent FINKEL, the personnel form filed at the time of his original employment did, in fact, designate him as permanent (10).

Each respondent, acting individually, upon becoming aware that petitioner would be appointed the next Public Defender of Rockland County, both through newspaper articles and rumor current within the legal profession, sought out petitioner BRANTI to ascertain his position concerning their continued employment as Assistant Public Defenders. Respondent FINKEL had two meetings with petitioner, the second after the publication of a newspaper article (plaintiffs' Exhibit 7, 81-82), indicating that the County Legislators would make the appointments of Assistant Public Defenders.

FINKEL indicated that he wished to remain as Assistant Public Defender but was told, "Pete [BRANTI] said it is not up to him." (80). Respondent TABAKMAN also discussed his continuation of employment at a Christmas cocktail party held at the office of Rockland County District Attorney, Kenneth Gribetz, but was told by petitioner BRANTI that the power to make the appointments of Assistant Public Defenders was in the hands of the Democratic caucus (108).

After having individually received these negative responses from petitioner, respondents, in concert, prepared a letter (plaintiffs' Exhibit 8 in evidence, 83-84) which was served upon petitioner BRANTI on December 30, 1977 and advised him of their desire and availability to continue serving as Assistant Public Defenders, together with their reliance upon the decisions of this Court in support of their Constitutional right to such continued employment (19, 83-84). On January 3, 1978, petitioner was appointed the position of Public Defender. Notwithstanding respondents' request for continued employment, petitioner began the process of executing termination notices for six Assistant Public Defenders, including respondents FINKEL AND TABAKMAN, 457 F. Supp. 1285.

On January 4th, this action was commenced by way of Temporary Restraining Order and Order to Show Cause. After a preliminary hearing, followed by a plenary trial, the United States District Court issued a decision on September 29, 1978 permanently enjoining the discharge of respondents on the sole ground of their political belief. Final Judgment was signed by District Judge BRODERICK on October 10, 1978 and unanimously affirmed by the Circuit Court of Appeals for the Second Circuit on February 20, 1979.

Throughout the course of these proceedings petitioner has been enjoined from "terminating or attempting to terminate, alter, change or in any way effect the respondents' current employment status as Assistant Public Defenders for the County of Rockland." (21). From the issuance of the Temporary Restraining Order until some time in May, respondents continued to receive their salary checks but were not permitted by petitioner to perform any of the duties of Assistant Public Defenders. In May of 1978 petitioner's counsel arrived at the dubious legal conclusion that the issuance of respondents' pay checks by the County of Rockland, and the subsequent holding of these checks in escrow by the County Attorney's office, would satisfy the terms of the Temporary Restraining Order. The District Judge's disagreement with that interpretation of his Order is apparent in footnote 4 of his decision, 457 F. Supp. 1285-1286. In October of 1978, petitioner BRANTI reassigned respondents to their duties as Assistant Public Defenders and resumed the issuance of their salary checks. Respondents have now been serving in exemplary fashion continously since October of 1978.

SUMMARY OF ARGUMENT

1. The basic issue presented to this Court is the Constitutional permissability of a patronage system which excludes all members of the "wrong" political party solely because of their failure to support the candidates of the majority party and their consequent failure to obtain sponsorship by such successfully elected Legislators. This, in turn, must be determined by placing the patronage system which denied respondents herein continued employment beneath the spotlight of

the three opinions in *Elrod v. Burns,* 427 U.S. 347 (1976). The plurality, in a detailed, broad-ranging decision, held that the practice of patronage dismissals is unconstitutional. The concurrence concisely set forth the five criteria used by Judge BRODERICK as the law of *Elrod* at its narrowest in determining this case at a trial level, while the dissent indicates that, although there are certain plaintiffs who could legitimately assert First Amendment interests, plaintiffs *Burns,* et al, were not among them. The dissenting opinion also expresses a desire to have a fully developed record justifying the fears of the plurality prior to ruling a patronage system unconstitutional. Respondents herein contend that the flagrant and unashamed politicizing of the quasi-fiduciary position of Assistant Public Defender by petitioner is constitutionally abhorent by the standards of all three opinions in *Elrod.*

Political sponsorship as a requisite for the retention of governmental employment is, in and of itself, a sufficient infringement upon First Amendment freedom of speech to render it constitutionally impermissable, even in the absence of other political evils such as coercion to change political allegiance, support of the election of certain candidates, or contribution of funds to these candidates.

2. Attorneys are not, *ipso facto,* confidential and policy-making employees. The issue of confidentiality and policy-making must be decided on a case-by-case basis and is dependent upon a factual showing that such relationship exists. The burden of proof lies upon petitioner to show a legitimate factual basis justifying his acknowledged First Amendment encroachment.

3. Petitioner's reliance upon this Court's decision in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1977) is misplaced. The trial Judge concluded, after exhaustive testimony, that respondents' political affiliation and their subsequent lack of sponsorship by a member of the Democratic majority was the *sole* reason petitioner attempted to discharge them. The testimony of petitioner BRANTI was clearly contradicted by that of several other witnesses and it is a fundamental rule of this Court that the trial Judge shall have great discretion where the credibility of witnesses is involved.

4. The Fourth Circuit decision in *Ramey* v. *Harber,* 589 F. 2nd 753, (4th Circuit, 1973), Cert. denied —— U.S. ——, 61 L. Ed. 2nd 275, is in no way contrary to the decision of the Second Circuit in the case at bar; the Fourth Circuit merely refused to apply an *Elrod* fact pattern retroactively to a situation which existed prior to this Court's *Elrod* decision.

POINT I

A Patronage System Which Permits The Dismissal Of All Members Of The Minority Political Party Is Constitutionally Invalid.

The District Court below has found, 457 F. Supp. 1287, and petitoner has virtually conceded, that respondents FINKEL and TABAKMAN could not have been continued in their employment in the governmental positions of Assistant Public Defender absent the sponsorship of a member of the "Democratic Caucus." Petitioner contends that such a "mere" sponsorship does not constitute prohibitive infringement of First Amendment rights, despite this Court's apparent hold-

ing to the contrary. Indeed, the *Elrod* plurality decision refers to the term "sponsorship" on three separate occasions; even the dissent, in footnote 4 (427 U.S. 381) implies reconsideration of the *Elrod* conclusion in the presence of employment exclusion as the result of lack of " 'right' political posture or *sponsorship*" (emphasis supplied). It is apparently petitioner's position that there is a significant differentiation between "mere" sponsorship and sponsorship in the presence of such coercive activity as change of allegiance to the majority party, contribution of money or participation in the election of majority candidates. This line of reasoning is specious in several respects. To begin with, it can be assumed that any of the three above described coercive practices, specifically proscribed by the plurality, would, if engaged in by governmental employees, result in the requisite sponsorship by the successful candidate to whom allegiance has been pledged or on whose behalf funds or election activity have been expended. More insidious, however, is the fact that conversion of allegiance, contribution or work on behalf of successful candidates at least gives the government employee the option of submitting to such coercion to maintain his job as opposed to exercising his right to free speech and subsequent discharge. Sponsorship is the greater evil in that it fails to allow the governmental employee even that limited option.

Petitioner's conclusion that Assistant Public Defenders serve at the pleasure of the Public Defender and that their offices become vacant upon the appointment of a new Public Defender is gratuitous and without support in the record. The District Court, on authority of *Perry* v. *Sindermann,* 408 U.S. 593 (1972) and *Rivera Morales* v. *Benitez de Rexach,* 541 F. 2nd

882 (1st Circuit, 1976), in footnote 10, 457 F. Supp. 1292 determined that the removability of respondents by the Public Defender is irrelevant to the constitutional issues presented in this law suit. Indeed, the very issue in *Perry* v. *Sindermann,* concerned an untenured schoolteacher who claimed a legitimate expectancy of re-employment although he had no such contractual right. Petitioner admits that it was the practice of previous incoming Public Defenders to retain a bipartisan mix among their assistants; in fact, respondent FINKEL had served throughout such period of change and certainly had reason to expect, contrary to petitioner's allegations, that he would be continued in employment so long as he performed his duties properly (94). Accordingly, petitioner's contention that respondents' terms coincided with that of their appointing Public Defender is not only erroneous, but irrelevant.

Although District Judge BRODERICK found that petitioner had, *at most,* a veto power over the individuals recommended to him, his right to veto appointees as Assistant Public Defender extended only to those hand selected by the Democratic caucus. He clearly did not have the power independently to appoint anyone without the permission of the Democratic caucus, effectively excluding respondents here from their constitutionally protected right of continued employment despite their political affiliation.

Petitioner sets up his own strawman implying that an affirmance herein will eliminate sponsorship in the political process. Clearly, this is far beyond the scope of the facts in this case and, indeed, beyond the thrust of the *Elrod* decision. Involved here is not sponsorship in the abstract; it is the requirement of responsorship

of one who was already holding a government job and who has the *Perry* v. *Sinderman* gloss of reasonable expectation of retention. Certainly no-one involved in this matter has ever argued that patronage is an absolute wrong where applied to positions which have no constitutionally protected incumbence.[1] The requirement of sponsorship is constitutionally impermissable when it serves no compelling state interest.

Petitioner's argument that affirmance of the lower Court ruling would establish a barrier to attorneys entering governmental service is equally without merit. Although a person has no right to governmental service, and there are a number of reasons that such service can be terminated, the government may not deny a benefit to a person for reasons which infringe on his constitutionally protected rights. *Perry* v. *Sindermann, supra.*

Petitioner would have us believe that respondents waived their constitutional rights because they were appointed through the political system. Initially, it should be pointed out that this is certainly inapplicable to respondent FINKEL who was appointed by a Democratic Public Defender, served under the full term of a Republican Public Defender, and wished to retain that same employment by the successor Democratic-appointed petitioner herein. Also, as found by the District Court during the term of Frank Barone, during which

[1] There is, however, authority, in the *Elrod* dissent, that, even in the absence of the continuing employment expectation, the refusal to hire those who possessed all requisite qualifications except the "right" political posture or sponsorship would be violative of the First Amendment. *Elrod vs Burns*, supra 427 U.S. at 381, dissent footnote 4.

respondent TABAKMAN was appointed, there was an *equal* mix of four Republicans, four Democrats and one unregistered attorney serving as Assistant Public Defenders. ONLY PETITIONER HEREIN HAS ATTEMPTED TO POLITICIZE THE QUASI-FIDUCIARY POSITION OF PUBLIC DEFENDER BY HIS UNASHAMED SELECTION OF MEMBERS OF HIS OWN POLITICAL PARTY TO SERVE ON HIS STAFF.[2]

Petitioner makes much of his professional knowledge of every attorney specializing in criminal law in Rockland County. Surely, there must be at least one highly qualified *Republican* attorney in Rockland County. Can we truly characterize a system which permits the total elimination of representatives of one of the major political parties of this Country as "gentle and moderate?"

[2] The effect of partisan politics on political appointments is not of recent vintage. In 1835, a United States Senate Committee reported, "So long as * * * patronage * * * was limited to * * * nominating to accidental vacancies [it] could, of course, exercise but a moderate influence either over the body of the community or of the office-holders themselves: but * * * when [appointive] offices * * * were regarded as the spoils of victory * * * without respect to merit; when it became to be understood that all who held office, hold by the tenure of partisan zeal and party service it is easy to see that the certain, direct and inevitable tendency of such a state of things is to convert the entire body of those in office into corrupt and supple instruments of power, and to raise up a host of hungry, greedy and subservient partisans, ready for every service, however base and corrupt * * *." The Age of Jackson, University of South Carolina Press 1972. Report of a Senate Committee to inquire into the extent of Executive Patronage February 9, 1835, 1011-12; U.S. Congress Senate Documents 23d Congress, 2d Session, III document 109, pg. 45.

POINT II

Respondents Were Neither Policy-Making Nor Confidential Employees.

This Court's decision in *Elrod* recognized that there exist certain situations where a paramount state interest permits the discharge of otherwise constitutionally protected employees for political reasons. These categories which fall without the constitutional protection of *Elrod* are characterized by the concurring opinion as policy-making or confidential employees.

Petitioner urges this Court that *all* attorneys, merely by virtue of their status as attorneys, are, *ipso facto,* both policy-making and confidential employees. In support of this petitioner cites a New York State Supreme Court case, *Matter of Clarke* v. *O'Brien,* 91 Misc. 2nd 190, 397 N.Y.S. 2nd 509 (Supreme Court, Suffolk County 1975) affirmed 56 A.D. 2nd 869, 392 N.Y.S. 2nd 383, on the opinion below (2nd Dept., 1976). However, *Clarke* was not only decided prior to this Court's decision in *Elrod,* but involved a State Court interpretation of New York State Civil Service Law. Nowhere, in *Clarke,* was political intrusion upon a First Amendment right claimed as a ground for relief. Because of the entirely different thrust of the claim under State Law, the Court in *Clarke* was more concerned with plaintiff's statutory job description than with the duties which he actually performed. However, in the case *sub judice,* District Judge BRODERICK obviously applied the correct standard by ascertaining, from the testimony of past and present Public Defenders, as well as Assistant Public Defenders, the actual duties performed by the respondents. Petitioner would have this Court substitute the conclusory judgment of

its witness, the Rockland County Personnel Director, a member of the same political party attempting to terminate respondents' services (141), in lieu of the detailed, factual tesimony of all the witnesses who actually served and worked with Assistant Public Defenders.

It would seem pertinent, prior to discussing the specific duties of respondents herein, to attempt to ascertain the intended parameters of confidentiality and policy-making as laid down by this Court. The *Elrod* plurality sets forth guidelines, at least for policy-making, with the caveat that it is the state's burden to demonstrate an *overriding* interest in order to validate an encroachment upon constitutionally protected rights (emphasis supplied), 427 U.S. 368. The plurality further suggests inquiry into the scope of responsibility, advisory capacity and implementation of broad goals as criteria for ascertaining those who are policy-making employees.

We believe that it would be helpful to consider not only the ground rules as set forth by this Court in determining confidentiality and policy-making, but the rationale behind their exclusion from the protective umbrella of *Elrod.* The plurality, in disposing of the argument that patronage is required to insure the political loyalty of employees to prevent the undercutting of representative government by tactics obstructing the implementation of policies of the new administration, permits patronage dismissals limited to those in a position to thwart the goals of the new administration. It would be reasonable to assume that the same rationale applies to confidential employees, i.e., their designation as such would be based upon their ability to thwart the goals of the party in power.

Let us now consider respondents' duties in light of that reasoning. Respondents would pick up files at the Public Defender's office for the Courts which they were assigned to defend indigent defendants, review those files and proceed to appear in Court. If there was any question with regard to eligibility for representation, an adjournment would be requested for determination by the Public Defender. Respondents had no voice in the overall operation of the office, nor were there any confidences between the Public Defender and his assistants other than the usual employer-employee relationship (85-86, 106-107). The respondents were neither department nor bureau heads nor even supervisory personnel (97, 106). Although given some latitude with regard to case-by-case decisions, respondents were still required to work within the policy framework set down by their supervisor (100).

Frank Barone, former Public Defender who supervised FINKEL for six years and TABAKMAN for more than two, clearly and unequivocally indicated that neither was a policy-making or confidential employee (55-56). Even petitioner conceded that his assistants' policy-making latitude was limited to their individual cases (178).

A review of respondents' duties clearly indicates that they were not, in any way, in the position to obstruct or thwart the goals of the incoming Public Defender. Because of their limited discretion, the only way they could embarrass or discredit their newly appointed supervisor would have been through the improper performance of their case-by-case duties. Even assuming that professional attorneys would violate their oaths in such fashion there are clearly less constitutionally intrusive procedures for dealing with that situation. Specifically, employees may always be discharged for good cause such as insubordination or poor job performance, when those bases, in fact, exist. *Elrod,* Page 366.

The District Court has set forth an incisive reading of this Court's intent in conjoining confidentiality with policy-making, keeping in mind the ability of the confidential employee to thwart or undermine his principal's goals. Petitioner's own witness, Mr. Anderson, indicates positions which typify such confidential relationship such as secretary to the District Attorney, confidential secretary to the President of the Community College, and Assistant to the Chairman of the County Legislature (137). To effectuate the *Elrod* principle, such positions must be limited to a so-called, "right-hand man;" to confuse the term, "confidential" with the broad job requirement that a supervisor have "confidence" in his subordinate would render *Elrod* moot.

POINT III

Petitioner's *Mt. Healthy*—Same Decision Anyway Defense Was A *Post Hoc* Rationalization.

Subsequent to its decision in *Elrod*, this Court, in *Mt. Healthy City Board of Education* v. *Doyle,* supra, logically concluded that a plaintiff in an *Elrod* suit may not, by invoking a constitutional privilege, prevent his termination as the result of other non-constitutionally protected activities. In what has come to be called the "same decision anyway" defense, this Court held that a governmental agency possessed of grounds other than constitutionally protected activities, was within its rights to discharge an employee if those grounds, irrespective of the exercise of free speech,

would have justified such dismissal This, in *Mt. Healthy,* where there existed multiple grounds for the plaintiff's discharge, in discounting consideration of his constitutionally protected free speech right, the employer was entitled to prove that it would have reached the "same decision anyway."

It is an ancient, well accepted and, indeed, very practical rule of Federal construction which grants great weight to the findings of a trial Court where candor and credibility of the witnesses can best be judged. *United States* v. *United States Gypsum,* 333 U.S. 364, 395-396 (1948). This is true even though the Appellate Court, based upon the written record, might be persuaded to come to a different conclusion. *Martin* v. *Vector Company, Inc.,* 498 F. 2nd 16 (1st Circuit, 1974).

It is obvious that District Judge BRODERICK, having heard petitioner herein testify on two separate occasions, simply did not believe that anything other than political considerations played a part in his refusal to retain respondents in employment. Thus, the factfinder specifically states that one of the alleged grounds for the refusal to reappoint respondent FINKEL was, "merely a *post hoc* rationalization * * * devised late in the hearing process in an effort to thwart what was apparently perceived to be plaintiffs' promising development of the case." Judge BRODERICK's disbelief of petitioner's testimony is underlined at footnote 11, wherein he finds, "At the second set of hearings BRANTI, apparently believing that the case was not going well, changed his testimony. I do not credit his later testimony, which was apparently structured to meet the perceived needs of the litigation as it developed." 457 F.Supp. 1292.

The trial Court's reservations concerning petitioner's veracity are well borne out by the record, despite petitioner's contention that his testimony was uncontroverted. Although alleging a poor opinion of respondent TABAKMAN in 1975 (376) petitioner told TABAKMAN, in December of 1977, that he would have liked to keep him in the office but did not have the power to make that appointment (108). As a further reason for not continuing TABAKMAN in office, BRANTI referred to an ethics opinion of the New York State Bar Association, but, under examination by the Court, admitted that he did not read this opinion until some time subsequent to his attempt to terminate TABAKMAN, leading the Court to characterize it as a matter of complete indifference (372). Conclusive in the demolition of petitioner's "same dicision anyway" defense is the undeniable fact that none of these alleged "compelling" reasons were ever revealed by petitioner, to anyone, prior to the initiation of this legal action.

Petitioner may be correct in his statement that there was no conspiratorial design to replace all the Republicans with Democrats; what is apparent is that no-one would be appointed or reappointed Assistant Public Defender without the sponsorship of a Democratic County Legislator.

POINT IV

There Is No Conflict Between The Judicial Circuits Concerning The Applicability Of *Elrod vs. Burns.*

It is evident that petitioner has misread *Ramey* v. *Harber,* supra, in which the Circuit Court reversed the District Court's finding in favor of plaintiffs who were not retained in their positions as Deputy Sheriff. Al-

though there was some discussion by the Circuit Court majority of the effect of the Virginia law imposing definite terms on Deputy Sheriffs, even a cursory reading of the majority decision clearly indicates that the *sole* reason for the reversal was the Fourth Circuit's refusal to apply *Elrod* retroactively as the District Court had done. "Although there is some doubt regarding the applicability of *Elrod* in this case, *it is unnecessary to decide that question* in view of our conclusion on the issue of retroactivity. Therefore, for the purposes of disposing of this litigation, we assume without deciding that *Elrod* is applicable." (Emphasis supplied). Indeed, Circuit Judge HALL dissented solely, "Because I feared that the majority opinion may be read to imply that *Elrod* would apply prospectively on facts similar to this case * * *." In this case, not only did petitioner BRANTI's attempted infringement of respondents' first amendment rights occur after the decision in *Elrod;* he was actually advised by them of their intention to rely on this Court's holding should he persist in his efforts to deny them continued employment as Assistant Public Defenders solely because of their lack of political sponsorship (83-84).

CONCLUSION

For the above stated reasons, the decision of the District Court, unanimously affirmed by the Second Circuit of Appeals, should be affirmed by this Court.

Respectfully submitted,

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1654

PETER BRANTI, AS PUBLIC DEFENDER
OF ROCKLAND COUNTY
Petitioner

v.

AARON FINKEL AND ALAN TABAKMAN,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONER

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---

REPLY BRIEF OF PETITIONER

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1. Respondents argue that there is no support in the record for Petitioner's position that Respondents serve at the pleasure of the Public Defender and their positions became vacant with the appointment of a new Public Defender. On the contrary, the testimony of James Anderson, the Personnel Officer of the County of Rockland, clearly states that those positions of Assistant Public Defender, Assistant County Attorney, part-time, and Assistant District Attorney, serve at the pleasure of the appointing authority (A. 138). Re-

spondents' unfair implication that witness Anderson is somewhat biased finds no support in the record, in fact, Judge Broderick in footnote 6 of his opinion cites the testimony of witness Anderson. James Anderson, the Personnel Director of the County of Rockland has had bipartisan support in his appointments and reappointments to office. He has a history of being unbiased in all of his dealings.

2. Respondents reliance on *Perry* v. *Sindermann* (408 U.S. 593) is misplaced. In *Perry* v. *Sindermann,* Respondent Sindermann was President of the Teacher's Association and publicly disagreed with the College Administration. There was an obvious restriction on his freedom of speech since his job was *conditioned* upon the "proper" expressions of his beliefs. This Court held in that case that lack of tenure doesn't give the government the right to vitiate your constitutional rights. In the case at bar, we dispute that there was any restrictions or conditions placed on Respondents' freedom of association or any conditioning of Respondents' employment on their doing anything.

The question is, did Petitioner Branti condition Respondents re-employment on Respondents willingness to do anything in furtherance of the principles of the Democratic Party? The answer is no. There is nothing in the record to suggest that Petitioner or the Democratic Legislators did anything to restrict Respondents' freedom of association.

The Perry case also contained a procedural due process claim in that Sindermann claimed that he was denied a hearing. The Supreme Court disagreed with the Circuit Court of Appeals that a *subjective* expectancy is protected by due process. As was stated in *Board*

of Regents v. *Roth,* 408 U.S. 564 at page 575 "it stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another". I respectfully call to the Court's attention that Respondents are lawyers with full-time law practices who used these positions to supplement their incomes.

In the Perry case, the teachers had an understanding that there was a de facto tenure program. In the case at bar, there was no such implied contract. Respondents had no *objective* expectancy of re-employment. The fact that there was a bipartisan Public Defender's Office in the past should not have given an *objective* indication to the Respondents that *they* (in lieu of others) would be continued. Respondent Finkel was present when Frank Barone became Public Defender. He saw Barone not rehire individuals from his predecessor's office. He then again saw Frank Barone replace individuals when the Legislature changed majority parties in 1974. If Finkel had an *objective* expectancy of re-employment, why did he change his registration voluntarily to Democrat? Why did he seek support of various Democratic leaders? We believe therefore that the Perry case is inapplicable. The Respondents clearly did not show a loss of constitutional rights and they did not show an *objective* expectancy of re-employment.

3. Respondents would have this Court believe that they were political novices. On the contrary, the record shows that both Respondents were politically active and attempted to be reappointed through the political system and if successful they never would have been concerned about the constitutional rights of the other attorneys who were not appointed. Respondents seemed to imply at page 11 of their brief that there is some-

thing insidious about appointing members of your own political party to positions of public trust. If in fact there is something wrong with that system, then the appointment process used for appointments to the Federal Judiciary is as insidious. We don't believe either system is insidious. The ultimate criteria is qualification for the job. There were many qualified Democratic and Republican lawyers, but there were only nine jobs. Would Respondents have made the selection process a lottery? Branti testified that he was surprised that Republican Minority Leader Grogan didn't approach him since Branti was prepared to consider Republicans. In fact, he asked Republican Legislator Dusanenko about an individual who Branti thought was a Republican and was rebuffed by Dusanenko who *only wanted* Tabakman (A. 161, 169-170).

4. Respondents' attempt to persuade this Court that they are mere office boys flies in the face of *their own* description of their jobs as "quasi fiduciary". We submit that these "quasi fiduciary" jobs are policymaking and confidential. They were described as such by the Personnel Director of the County and can in no way be compared with such non-fiduciary positions as janitors, elevator operators, clerks and the like. At page 15 of their brief, Respondents described the Personnel Officer's testimony that typifies such confidential relationships. However, the Personnel Officer as is seen in the record, placed the various attorney positions of the County of Rockland in the very same class of employment (A. 137). That class of exempt employees numbered under fifty out of two thousand county employees (A. 135-136).

5. Respondents argue that there is no conflict in the Circuits since the holding in *Ramey* v. *Harber,* 589

F.2d 753 (CA 4) cert. den. —— U.S. ——, 61 L.Ed.2d 275, is solely on the issue of retroactivity. We will concede that the Circuit Court's holding in that case was solely on the issue of retroactivity. However, in our brief, we compared the Fourth Circuit's reasoning on the Elrod issues to the facts and issues in this case. Additionally, Judge Hall of the Circuit Court did not *dissent* as is set forth in Respondents' brief, he *concurred* and he concurred quite emphatically that the Elrod issues were not present regardless of retroactivity. We argue similarly.

6. Finally we come to what must be the most important issue in this case. Whether political sponsorship alone is in and of itself a breach of the Constitution. Respondents obviously believe that it is just as insidious to sponsor somebody as to politically coerce them. We believe as we have fully set forth in our brief, that political sponsorship alone does not offend the Constitution, such as would require a compelling state interest to legitimatize it. But if it was unconstitutional, we did, in our brief, show a compelling state interest.

Respondents' argument that by not giving Respondents the opportunity to succumb to political pressures is more offensive to the Constitution than political coercion is specious, riduculous and does not deserve further ink. Respondents were not considered for reappointment by Branti and the political majority. Legislative Chairman Sam Colman's testimony regarding Finkel and the former Public Defender Office's reputation in his community is significant in this regard (A. 324-326). But despite this cold shoulder from every one involved in the process of appointment, the Respondents persisted in using all of their political contacts,

real or imagined, (including in Finkel's case, his voluntary change of registration), to ingratiate themselves with the political party in power. They were unsuccessful, so they stamped their feet, yelled like children and said that if they weren't successful playing by the rules, they would go to Federal Court and change the rules.

Despite arguments to the contrary, the affirmance of this case by applying the Elrod rule to attorneys where there is mere sponsorship and no political coercion, certainly would, for all practical purposes, eliminate all forms of political patronage.

CONCLUSION

For the reasons stated in both petitioner's brief and petitioner's reply brief, the judgments below should be reversed.

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